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The effect upon creditors of the payment of premiums on life insurance taken out in favor of a wife or children by an insolvent husband has been the subject of much controversy in courts. By the authorities which have passed upon the question, independent of statute, three distinct propositions seem to have been announced: First, that in the absence of actual fraud, the fund derived from insurance upon his own life by an insolvent debtor in favor of his wife or child or children, dependent upon him, cannot be reached by his creditors, and made subject to the payment of his debts, except, possibly, in certain contingencies, the amount of the premiums paid by the insolvent debtor during insolvency. In support of this doctrine, either in whole or in part, are Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. Rep. 41; Appeal of Elliott's Exrs., 50 Pa. St. 75; Ætna Nat. Bank v. United States Life Ins. Co., 24 Fed. Rep. 770; Bank v. Hume, 3 Mackey, 360; *In re* Anderson's Estate, 85 Pa. St. 202; Pence v. Makepeace, 65 Ind. 345; Pinneo v. Goodspeed, 120 Ill. 536, 12 N. E. Rep. 196; State v. Tomlinson (Ind. App.), 45 N. E. Rep. 1120; Holmes v. Gilman, 138 N. Y. 369, 34 N. E. Rep. 205; Stigler's Ex'x v. Stigler, 77 Va. 163; 2 Bigelow, Frauds, p. 129. To this effect in principle are also Forrester v. Gill (Colo.), 53 Pac. Rep. 230; McLean v. Hess, 106 Ind. 555, 7 N. E. Rep. 567. Another doctrine supported by some authority is that the procurement of such insurance by an insolvent is a voluntary conveyance or gift, which is void as to existing creditors, though no fraud may have been intended, and that the whole of the insurance would be subject to the debts of the insured. The principal authorities in support of this doctrine seem to be Fearn v. Ward, 80 Ala. 555, 2 South. Rep. 114; Transportation Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. Rep. 272, Stokes v. Coffey, 8 Bush, 533. Another line of authorities holds that in such cases the amount of the premiums paid by the insolvent, and that alone, of the proceeds, can be reached by his creditors. The Supreme Court of Appeals of Colorado has recently, in the case of Hendrie & Bolthoff Mfg. Co. v. Platt, considered the question at great length and exhaustively reviewed the authorities. They find that the weight of authority is in favor of the doctrine announced by the first line of authorities, and that it is better sustained upon reason and upon principle. The reasoning by which the courts holding to this view support their conclusions, says the Colorado court, commends itself most highly to our judgment. In the first place, it is undoubtedly the law, as held almost if not quite universally, that the policy is the contract of insurance, and that, the moment it is issued, its ownership vests in the beneficiary. The applicant for it, and he who paid the premium which secured it, cannot thereafter change, assign, alienate, or incumber it, or any rights to be secured under it, upon compliance with its provisions. He cannot even defeat it by a refusal to pay the subsequent premiums required, if the beneficiary or any person for her pays them. The contract is between the insurance company and the beneficiary. To this effect are the authorities above cited, and also numerious others to which reference might be made, including the following: Wilburn v. Wilburn, 83 Ind. 55; Yore v. Booth, 110 Cal. 238, 42 Pac. Rep. 808; Ricker v. Insurance Co., 27 Minn. 193, 6 N. W. Rep. 771; Bliss, Ins. § 318. The payments of subsequent premiums do not create new contracts, nor, strictly speaking, do they constitute renewals of the insurance contract. They are simply the fulfillment of conditions required by the original contract, a failure to comply with which would work a forfeiture. Besides, the contract is based upon and its fruits finally realized, if at all, because of the insurable interest of the beneficiary in the life of the assured. The latter is equally as essential, and is equally an important consideration of the contract. Upon what principle or theory, then, can it be said that rights based upon this insurable interest, which is an interest or right purely personal to the beneficiary, can inure to the benefit of the creditors of the assured? Can they say to the wife: "Though it is true that this fund was realized upon your insurable interest in the life of your husband, not upon his interest in his own life, nor upon our interest in it as creditors, yet, because he paid the cash premiums required while insolvent, we should subject to the payment of our debts, not only

so much of the fund as equals the amount of premiums so paid, which is all he took from his estate, and all of which he deprived us, but we will take the whole fund. We will take back that which he took from us, and also that which could not have been secured without your insurable interest in his life." In accordance with these views, the court lays down the following propositions of law. Life insurance taken out by a husband for the benefit of his wife and children, without fraudulent intent, cannot be subjected by his creditors, unless it be to the extent of premiums paid during his insolvency, and subsequent to becoming indebted to such creditors. Where a husband indebted to the wife has agreed keep his life in her favor insured for an amount sufficient to pay the debt, which is in excess of premiums paid while insolvent, her right as a creditor to have the amount of such premiums subjected to her debt on his death is superior to that of other creditors. No presumption of an intent to defraud creditors arises from an insolvent husband insuring his life for the benefit of his wife and children in a very large amount, where he is indebted to the wife in a sum greater than the aggregate of all the premiums paid. The presumption is that, in paying such premiums, he was preferring his wife as a creditor, which entitled her, by virtue of her insurable interest in his life, to all the insurance such premiums would buy. The fact that premiums on life insurance taken out by a husband for his wife on the distribution policy plan, the distribution period to be completed in 20 years, are paid while the husband is insolvent. will not entitle creditors to its proceeds, where the policy matures by the death of the insured previous to the expiration of the 20 years, and the husband is indebted to the wife in an amount more than sufficient to pay all the premiums.

NOTES OF IMPORTANT DECISIONS.

LIFE INSURANCE — APPLICATION — WARRANTIES—BREACH.—In Aloe v. Mutual Reserve Fund Life Association, 49 S. W. Rep. 553, decided by the Supreme Court of Missouri, it appeared that an application for insurance in a mutual assessment company warranted the answers to be true, and stated that the application and the by-laws were to be a part of the contract, which was to be void if any of the answers of the application were untrue. The by-laws provided that every application should be a warranty, and that the concealment of any fact or an untrue answer should avoid the membership. The policy stated that insured was received as a member in consideration of the answers and agreements of the application, which was made a part of the contract. It was held that the answers in the application were warranties, and that where the answers in an application for insurance are warranties, an untrue answer avoids the policy, even if not material to the risk. It appeared that an application for a policy warranted that the applicant had not been treated by any physician for 30 years; that his application for insurance had been rejected by two companies; that he had certain other insurance; that for 12 months last past he had been in good health, had not visited any place for his health, and no physician had given an unfavorable opinion concerning it. It was shown that during the 30 years preceding he had been repeatedly treated by physicians; that his application for insurance had been rejected by six companies instead of two; that his statement as to other insurance omitted one policy; that within 12 months he had been treated by physicians, and medical examinations had disclosed traces of albumen in his urine; that he had visited a foreign country for his health, and consulted physicians there; that several physicians who had examined him with reference to life insurance had rejected him. It was held the policy was void because of a breach of the warranties.

NUISANCE—CEMETERY.—Lowe v. Prospect Hill Cemetery Assn., 78 N. W. Rep. 488, decided by the Supreme Court of Nebraska, is a well considered case, with an elaborate review of the authorities on the question of private nuisances. It appeared that an association, conducting and maintaining a cemetery in the city of Omaha, proposed to devote to an extension of its business certain land adjoining that formerly used by it. Thereupon an action was brought by adjacent property owners for an injunction upon the grounds: (1) that interments in the strip of new land would pollute and poison water in the wells in lands owned by the plaintiffs; and (2) that the using of the additional land by the cemetery association for its purposes would violate ordinances of the city of Omaha. The decision turns principally upon the first ground above named. The decision of the court is that the proposed action of the defendant would constitute a private nuisance, and that, therefore, the plaintiffs were entitled to injunctions. The following is from the opinion: "We cannot better express our views on this subject than to quote from the opinion of Clark v. Lawrence, 59 N. Car. 83, which was an action to enjoin parties from maintaining a cemetery. The court said: 'The jurisdiction of a court of equity to restrain, by an injunction, the

erection or continuance of a nuisance, either public or private, which is likely to produce an irreparable mischief, is well established. It is equally well settled that the destruction of, or injury to, the health of the inhabitants of a city or town, or of an individual and his family, is deemed a mischief of an irreparable character. * * * In cases of this kind, the plaintiff will not have to encounter the difficulty that a place for the burial of the dead, within the limits of a city or town, or near the residence of a private person in the country, is considered a matter of public weal. On the contrary, the public sentiment is already, or is becoming to be, in favor of more secluded spots, where we, like the patriarch of old, "may bury our dead out of our sight." Whenever, then, it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will injure life or health, either by corrupting the surrounding atmosphere or the water of wells or springs, the court will grant its injunctive relief, upon the ground that the act will be a nuisance of a kind likely to produce irreparable mischief, and one which cannot be adequately redressed by an action at law.' See also Powder Co. v. Tearney, 131 Ill. 322, 23 N. E. Rep. 389; Jung v. Neraz, 71 Tex. 396, 9 S. W. Rep. 344; Barnes v. Hathorn, 54 Me. 124. In Gilford v. Babies' Hospital (Sup.), 1 N. Y. Supp. 448, the court enjoined the proposed opening of a hospital for the care of infants, on the ground that the locality in which it was proposed to locate the hospital was a residential locality, and that the probability of contagious diseases being disseminated in the neighborhood would threaten the comfort and security of the inhabitants. In Hurlbut v. McKone, 55 Conn. 31, 10 Atl. Rep. 164, the maintenance of a planing and moulding mill near the plaintiff's home was enjoined as a private nuisance, on the ground that the smoke and dust from it interfered with the comfortable and reasonable use and enjoyment of the plaintiff's home. In Rodanhausen v. Craven, 141 Pa. St. 546, 21 Atl. Rep. 774, the establishing of a carpet cleaning establishment in the residence locality of the city was enjoined upon the ground that the dust arising from the cleaning of carpets would invade the homes of people living near by, and disturb their reasonable enjoyment of their homes. To the same effect see Haugh's Appeal, 102 Pa. St. 42; Appeal of Pennsylvania Lead Co., 96 Pa. St. 116; Adams v. Car Co., 131 Ind. 375, 31 N. E. Rep. 57; Clowes v. Water Works Co., 8 Ch. App. 125. In Farrell v. Cook, 16 Neb. 483, 20 N. W. Rep. 720, the owner of some jacks and stallions was enjoined from keeping and standing them for mares in view of the plaintiff's dwelling, upon the ground that such a use of the defendant's property offended against the laws of decency, and was, therefore, a private nuisance. In Barton v. Cattle Co., 28 Neb. 350, 44 N. W. Rep. 454, it was ruled that the pollution of a stream of water, by discharging into it the dung, urine, etc., of a large feed stable, thus rendering the water unfit for use, and creating a stench, constituted a nuisance, and should be enjoined. In Association v. Peterson, 41 Neb. 897, 60 N. W. Rep. 373, it was held that the befouling of a well or cellar by filthy and noxious matter, permitted by the defendant to percolate through the adjacent soil, constituted a nuisance. To the same effect is Gas Co. v. Thomas, 41 Neb. 662, 59 N. W. Rep. 925. These cases, then, are authority for the proposition that a use made by one of his property which works an irreparable injury to the property of his neighbor; the use made by one of his property whereby the unwritten, but accepted, law of decency is violated; the use made by one of his property whereby his neighbor is deprived of the reasonably comfortable use and enjoyment of his own property; the use made by one of his property which will probably or likely endanger the health and the life of his neighbor, is a private nuisance and may be enjoined.' On the question of the probability of actual pollution of the wells by the extension of the cemetery, the court remarked: 'There is a sharp conflict in the evidence on this question—namely, whether these germs were likely to, or would probably, be carried by the liquid of the decomposing bodies and other moisture seeping into the graves, and thence sinking into the earth from the graves to the wells of appellees; the nature of the soil, the contour of the cemetery grounds, the quantity of liquid matter set free by decomposing human bodies, and the annual precipitation of moisture considered. The evidence shows that about eighty per cent. of the human body is liquid, and that the annual precipitation of moisture is 23 inches plus; and experiments show that soil which has been cultivated or dug up will absorb nine or ten times the amount of the moisture which falls upon it that the unbroken sod will. Sketches of the Physical Geography and Geology of Nebraska, by Aughey, p. 45. The witnesses for appellant gave it as their opinion that these germs were not likely or would not find their way from the graves to the wells. The witnesses of appellees were of the contrary opinion. The district court adopted the opinion of appellees' witnesses. We cannot say that it erred in this. Indeed, we think it did not. The evidence showed that some years before this trial occurred such diseases as typhoid and scarlet fever and diphtheria were more prevalent in the vicinity of what is now the old cemetery than elsewhere in the city of Omaha; that the families afflicted with those diseases used water from wells; and an eminent physician testified that, in his opinion, such diseases were communicated by germs which had found their way from the old cemetery to the wells.' "

HUSBAND AND WIFE—CONVEYANCE TO WIFE—FRAUD—RESCISSION.—In Basye v. Basye, it was decided by the Supreme Court of Indiana that equity will set aside a conveyance procured by fraud, though it be by a husband to his wife;

that a complaint that plaintiff's wife, with the intent to deceive him, promised to be a dutiful wife, and requested that certain property be deeded to her, and that he might put the consideration at a certain sum, which would show his interest in it, and, relying on her promises, he deeded the property to her, without other consideration, shows that the conveyance was without consideration, and that a voluntary conveyance by a husband to his wife, fraudulently procured by the wife through shamming affection for him and promising to be a dutiful wife, with the intention of abandoning him and procuring a divorce as soon as the conveyance was made, will be set aside for fraud, since her promises as to future conduct and representation as to her affection were representations of present facts, and not merely unfulfilled promises. Baker, J., says: "Suit to cancel deed for fraud. The material averments of appellant's complaint are these: The parties are husband and wife, and have been for 20 years. They owned by entireties certain land. There had been small differences between them, and appellee, without appellant's fault, had treated him coldly for a long time. Appellant was a dutiful husband throughout. He was in love with his wife, and she knew it. He desired to live with her in peace, concord and affection. Suddenly she became profuse in professions and demonstrations of love; she promised to be a dutiful and loving wife for the rest of their days. This conduct of hers was hypocrisy; in shamming she had in mind to defraud him by getting the title, and then deserting him. With this intent, and while making her false protestations and promises, she begged him to make her a deed, stating that the entire title ought to be in the wife, and that he might put the consideration at $2,200, which would always show his interest in the land. He was ignorant of her fraudulent design, and, relying on the apparent sincerity of her actions and promises, deeded her his interest, without consideration other than that the title should be in her as his wife and in trust for him, and that their marital relations should continue peaceful and loving. In a few days she abandoned him, and filed her complaint for divorce, which is yet pending, untried. The charges in the complaint for divorce are untrue. Demurrer to complaint for want of facts was sustained. Judgment on appellant's refusal to plead further. Appellant cites no authorities, and simply insists in a general way that the complaint states sufficient facts. Appellee contends that the complaint is bad, because it shows: First, that the deed was voluntary; second, that it was for a sufficient consideration; third, that there was no fraud; fourth, that the suit is between husband and wife concerning real estate; and, fifth, that a divorce proceeding is pending, in which alone the matters complained of can be adjudicated. Though a voluntary conveyance is valid between the parties, and parol evidence is inadmissible to impress a trust upon an absolute deed, equity affords relief against fraud in the procurement. The $2,200 which was to have been named in the deed would have constituted a valuable consideration, if paid; and appellant could not have proceeded without repaying or offering to repay the amount. But the complaint does not show that this sum was recited in the deed as a consideration, much less paid. It affirmatively appears that appellant executed the deed without consideration other than one he could not tender back. Appellee cites Fouty v. Fouty, 34 Ind. 434; Burt v. Bowles, 69 Ind. 6; Bethell v. Bethell, 92 Ind. 324, and other authorities, to the effect that fraudulent representations must relate to existing facts, and that promises made to be performed in the future, and afterwards broken, do not constitute fraud; to permit a rescission for fraud by one who has no ground for complaint except an unfulfilled promise, a broken contract, would obscure elementary distinctions between remedies, and tend to nullify the statute of frauds. In this case the false representations were made concerning a present fact. Representations may consist in acts as well as words. When appellee caressed her husband, after a long period of coldness, she made a solemn affirmation of present fact just as much as when she told him in words that she loved him and begged his forgiveness of her past indifference. When she caressed him, and promised to be a good wife in the future, her promise, as well as her kiss, was a representation of present fact. A present state of mind is a present fact. Bigelow, Frauds (Ed. 1888), pp. 483, 484. Appellee owed appellant the utmost good faith and frankness. There existed between them a relation of special confidence and trust. The principle also applies here that, whenever the confidence resulting from such a relationship is abused, equity will interfere. 2 Pom. Eq. Jur. § 963; Schouler, Husb. & Wife, § 403; Bigelow, Frauds (Ed. 1888), p. 353. It was a fraud on appellant for appellee to conceal her intention of abandoning him as soon as she got his property. That the husband is usually the stronger may be true; but that he is not always the dominating force in the marriage union is known from many well-authenticated instances, extending from the present back to the time of Delilah. A few of these have gotten into the law books. In Evans v. Carrington, 2 De Gex, F. & J. 481, the wife induced the husband to deed property to her, on the basis that it was her due under the marital relation. She intended, as soon as she could get possession, to leave, and never to live with her husband again. The deed was annulled. Evans v. Edmonds, 13 C. B. 777, is very similar in facts and result. Brison v. Brison, 75 Cal. 525, 17 Pac. Rep. 689: The wife importuned the husband to put the title to his land in her name, stating that she would hold it for his benefit, and reconvey it on demand. When she made the promise, she intended to hold the land as her own, and to desert her husband. This was held to be active fraud. Bartlett v. Bartlett, 15 Neb. 593, 19 N. W. Rep. 691, resembles the

Brison case. A quotation from Turner v. Turner, 44 Mo. 539, shows the nature of that case: 'A wife in whom her husband reposed the strictest confidence might well be calculated to exert an influence on his mind and obtain the title to property in her own name. If it was done with an honest intent to secure a home for herself and her offspring, the transaction would not only be legal, but praiseworthy. But if the influence was exerted with the design of despoiling the husband, and then abandoning him, the law would condemn and stigmatize the transaction.' Stone v. Wood, 85 Ill. 603: Wood and his wife had lived in Galesburg. Wood went to Bloomington to work. His wife wrote him that, if he would put the title to their Galesburg property in her name (by means of a trustee), she would sell it for $1,800, pay his debts, and come to him with the balance, and they would buy a new home. She intended to cheat her husband, financially and maritally. After getting the deed, she conveyed to Stone, who knew of her fraud and held the property for her benefit. The court decreed that the defendants restore the title to plaintiff and account for rents. In Meldrum v. Meldrum, 15 Colo. 478, 24 Pac. Rep. 1083, the wife had grown tired of her husband; but she wanted some of his property, unincumbered. So she simulated ardent affection, and he, under the spell of her allurements, conveyed to her a valuable property in Denver. Then she drove him from the house, and applied for a divorce. His suit to regain the property was sustained. The fourth claim of appellee is that this suit will not lie because it is between husband and wife concerning real estate. Married women have been emancipated by the statutes of this State. They must respond for frauds practiced upon their husbands, as well as for those upon others."

See Va. Neg. Inst. Act 863

THE STATUS OF THE LAW GOVERNING THE LIABILITY OF IRREGULAR INDORSERS.

Certainty, stability and uniformity should characterize, above everything else, the rules of law governing and fixing the liability of all parties to negotiable paper. The purpose and effect of the old "custom of merchants" and the law merchant were the attainment of this end. The canons of law require it, the usages of trade and the necessities of business communities demand it now as in early times. Nevertheless, the decisions of the courts in this country touching the liability created by irregular or anomalous indorsements on negotiable paper lack wholly such essentials. The English reports earlier than our own seem to contain no precedents on the question; nor does it appear that Lord Mansfield, the great authority on commercial law, ever shed the light of his mind on it. A person other than the payee signing a note on the back, before delivery or acceptance, and for the purpose of giving it credit, has run the gamut of liability known to commercial law. Indeed, this impersonal party has been a nondescript in law. And if a promissory note is a "courier without luggage," the irregular indorser has been an outrider of bad reputation. An irregular indorser has been held to be a joint maker, a surety, a guarantor, a first indorser and a second indorser, with all their respective rights and obligations attaching; and, in some instances, he has assumed no responsibility whatever. The text-writers reflect the discrepancies of judicial decisions in their views on the subject.[1] The same courts have shifted their position from time to time as to the liability of an irregular indorser,[2] and have evolved fine spun and unique theories in order to pass between the Scylla and Charybdis of conflicting precedents.[3] To some extent the confusion of judicial opinion seems to have arisen from the application of the strict rules of the law merchant.[4] Again, it arose from the application of the fixed rules of commercial law to the contract, after the admission of evidence dehors—the rebuttal of one presumption to be immediately followed by another presumption;[5] and what such a scheme of interpretation would produce was

[1] Daniel (Neg. Inst., sec. 714), is of the opinion that a party who puts his name on a negotiable note before indorsed by the payee should be presumed to be a first indorser. Tiedeman (Com. Pap., sec. 271), believes that the liability is that of a guarantor. Norton (B. & N., sec. 68), takes the position that he is *prima facie* a second indorser; Randolph (Com. Pap., sec. 831), that he is *prima facie* a joint maker. Story (Prom. N., sec. 58), takes the same view, and likewise Parson (B. & N., secs. 120 and 121), and Edwards.

[2] Brinkley v. Boyd, 9 Heisk. (Tenn.) 199; Harding v. Waters, 6 Lea (Tenn.), 324; Nelson v. Du Bois, 13 John. 175; Seabury v. Hungerford, 2 Hill (N. Y.), 80; Hall v. Newcomb, 3 Hill (N. Y.), 233.

[3] Story, Prom. N., secs. 48-470-476; Norton, B. & N., sec. 68; Harding v. Waters, 6 Lea (Tenn.), 324; Gillespie v. Campbell, 39 Fed. Rep. 724.

[4] Gillespie v. Campbell, 39 Fed. Rep. 724; McDonald v. McGruder, 3 Pet. 470; Shafer v. Bank, 59 Pa. 144, 98 Am. Dec. 324; Temple v. Baker, 3 L. R. A. 709. Some authorities hold, and it seems the better opinion, that the rules of the law merchant have no application whatever to such indorsements. Stack v. Beech, 74 Ind. 571, 39 Am. Rep. 113; 4 Am. & Eng. Ency. Law (2d. Ed.), 488.

[5] Schafer v. Bank, *supra*; Ellis v. Brown, 6 Barb. (N. Y.) 282; 4 Am. & Eng. Ency. Law (2d Ed.), 493.

beyond the realm of exact science or intelligible reduction. To avoid these difficulties the courts for a while seemed to go to the other extreme and held that parol evidence was not admissible, but unfortunately they reached different results in their interpretation of the contract.[6] It may be observed, however, that on some phases of this perplexing question there is a tendency, if nothing more, toward a crystallization of judicial opinion. Still, the different rules obtaining in different jurisdictions, bottomed on the doctrine of *stare decisis* in the respective States, and in some instances on statutes, prevent anything like uniformity, and, therefore, compel the examination of each distinct rule.

I. The rule obtaining in the Supreme Court of the United States, first laid down in Rey v. Simpson,[7] and now supported by the greater weight of authority, holds that a person other than the payee who signs a negotiable note on the back, before delivery, and to give it credit is *prima facie* liable as an original promisor to the payee and all *bona fide* holders; that as to the payee he is a maker,[8] and as to the formal and original maker, a surety.[9] The supreme court in its decisions substantially supports the French principle known as the Aval theory, although that court does not recognize it as the *ratio decidendi*.[10] In quite a number of States the same rule obtains.[11] This doctrine is based on the ground that a liability of some character was intended—the maxim *ut res magis valeat quam pereat* applying—; that the irregular indorser went on the note to give it credit and that to hold him as maker or surety, and not as indorser or guarantor, is the natural import of the transaction; for, in the application of the rules of the law merchant, which would follow in holding him a technical indorser—the liability then being successive and several and not joint, and the payee by force of fixed rules first indorser—the irregular indorser would not be liable to the payee, who in many instances gave the credit on the faith of the irregular indorser's responsibility.[12] And against holding him liable as a guarantor weighed the difficulties of showing a sufficient consideration to support the promise and such a contract that met the requirements of the statute of frauds.[13] The doctrine was consonant

[6] Price v. Lavender, 38 Ala. 389; Essex Co. v. Edmunds (Mass.), 71 Am. Dec. 758.

[7] 22 How. 341.

[8] Story, Prom. N., sec. 58; Salisbury v. Bank, 40 Am. St. Rep. 527; Dennis v. Jackson, 47 Am. St. Rep. 603; Rey v. Simpson, *supra*; Bank v. Cumberland Lumber Co., 100 Tenn. 479.

[9] Good v. Martin, 95 U. S. 90; Cook v. Southwick, 9 Tex. 615; Logan v. Ogden (Tenn.), 47 S. W. Rep. 489; Randolph, Com. Pap., sec. 832; Story, Prom. N., sec. 58.

[10] The Aval theory practically constitutes a suretyship. It would seem that it came from the civil law and now obtains in most of the countries on the continent. While never adopted in England it has received the approval of some of the courts in Canada. Under this theory it makes no difference whether the name of *le donneur d'aval*, or surety, appears on the back of the note, or on its face below the maker. Merritt v. Lynch, 9 Lower Canada Rep. 353; Lataor v. Gauthier, 2 Lower Canada Law Jour. 109; 11 Harvard Law Review, 54.

[11] Nathan v. Sloan, 34 Ark. 524; Killian v. Ashley, 24 Ark. 511, 91 Am. Dec. 519; Tabor v. Miles, 5 Colo. App. 127; Good v. Martin, 1 Colo. 165, 91 Am. Dec. 706; Gilpin v. Morley, 4 Houst. (Del.) 284; McCullum v. Driggs, 35 Fla. 277; Collins v. Trist, 20 La. Ann. 348; Chorn v. Merrill, 9 La. Ann. 533; Guidrey v. Vivet, 9 Martin (N. S.), 659; Lawrence v. Oakley, 14 La. 389; Bradford v. Prescott, 85 Me. 482; Woodman v. Boothby, 66 Me. 391; Calhoun v. Averill, 30 Me. 310, 50 Am. Dec. 630; Owings v. Baker, 54 Md. 82, 39 Am. Rep. 353; Bank v. Lange, 51 Md. 138, 34 Am. Rep. 304; Ives v. Bosley, 35 Md. 262, 6 Am. Rep. 411; Bank v. Hosie (Mich.), 70 N. W. Rep. 890; Gungz v. Giegling, 66 N. W. Rep. 48; Fay v. Jenks, 78 Mich. 312; Herbage v. McEntree, 40 Mich. 337, 29 Am. Rep. 536; Schultz v. Howard, 63 Minn. 196, 65 N. W. Rep. 363; Robinson v. Bartlett, 11 Minn. 410; Rossi v. Schawacker, 66 Mo. App. 67; Pohle v. Dickmann, 67 Mo. App. 381; Cahn v. Dutton, 60 Mo. 297; Kuntz v. Temple, 48 Mo. 71; Bank v. Dunklin, 29 Mo. App. 442; Salisbury v. Bank, 37 Neb. 872, 56 N. W. Rep. 727, 40 Am. St. Rep. 527; Currier v. Fellows, 27 N. H. 366; Martin v. Boyd, 11 N. H. 385, 35 Am. Dec. 501; Davidson v. Powell, 114 N. Car. 575, 19 S. E. Rep. 601; Hoffman v. Moore, 82 N. Car. 313; Ewan v. Brooks-Waterfield Co. (Ohio), 45 N. E. Rep. 1094; Seymour v. Mickey, 15 Ohio St. 515. See Champion v. Griffith, 13 Ohio, 228; Carpenter v. McLaughlin, 12 R. I. 270, 34 Am. Rep. 638; Bank v. Irons, 18 R. I. 718; McCrary v. Bird, 12 Rich. L. (S. Car.) 554; Carpenter v. Oakes, 10 Rich. L. 17; Logan v. Ogden (Tenn.), 47 S. W. Rep. 489; Society v. Edmonds, 95 Tenn. 53, 31 S. W. Rep. 168; Jamaica Bank v. Jefferson, 92 Tenn. 537; Harding v. Waters, 6 Lea (Tenn.), 324; Cook v. Southwick, 9 Tex. 815, 60 Am. Dec. 181; Carr v. Rowland, 14 Tex. 275; McGee v. Connor, 1 Utah 92; Sylvester v. Downer, 20 Vt. 355, 49 Am. Dec. 789; Donohue-Kelly Bk. Co. v. Bank, 13 Wash. 407, 52 Am. St. Rep. 57, 43 Pac. Rep. 359.

[12] Chaffee v. Jones, 19 Pick. 263; Nathan v. Sloan, 34 Ark. 524; Sibley v. Bank, 41 Mich. 196; Harding v. Waters, 6 Lea (Tenn.), 333; Story, Prom. N., sec. 469. As a maker such an indorser has been bound by an acknowledgment of the original maker taking the debt out of the statute of limitations. Perkins v. Barstow, 6 R. I. 505. The obligation being primary and not secondary, such an indorser is liable without any demand, protest or notice. Rey v. Simpson, *supra*; Jamaica Bank v. Jefferson, 92 Tenn. 537, 22 S. W. Rep. 211, 2 Parsons, B. & N., secs. 120, 121.

[13] Smith v. Kessler, 49 Pa. St. 142; Van Doren v. Tjader, 1 Nev. 380; Randolph, Com. Pap., sec. 843;

with another which gave force to the true intent of the parties; that as between the real parties "the nature of the transaction and the understanding of the parties at the time the transaction took place," parol proof of which was admissible, determined and fixed the liability.[14] Although in Massachusetts where this rule first seemed to have been adopted, parol evidence was not admissible formerly, to vary the contract, but it was held that such an indorsement was conclusive of his liability as an original promisor.[15] But in the States supporting the idea of joint makership or suretyship, the rule is now universal that parol evidence is admissible between the real parties to show their understanding at the inception of the note, and the irregular indorser is held to be a maker, a surety, a guarantor, or indorser according to such understanding.[16] The mere use of the terms "indorse" and "indorser," however, by the parties to the transaction in their discussion of it, without any evidence that the same were used in their technical sense, is not sufficient to establish an intention to restrict the irregular indorser's obligation to that of an indorser.[17] The instrument on its face is declared to be an original undertaking, creating a primary liability; that no new contract is raised by such an indorsement, nor a guaranty or a legal indorsement presumed.[18] To create this character of liability the irregular indorsement must be made at the inception of the transaction and before delivery of the note.[19] The presumption is that the indorsement was made at the inception and before delivery of the note,[20] but as between the immediate parties evidence is admissible to show the time of indorsement.[21] Some cases have held that the time of indorsement must be shown to fix on such an indorser the liability of maker.[22] And when the indorser places his name on the note subsequent to its making, another and different character of liability seems to be created and he is bound as a guarantor;[23] and to support the contract of guaranty a sufficient consideration—a consideration other than the one passing from the payee to the maker at the delivery of the note—must be shown.[24] The indorsement, however, will relate back to the execution of the instrument if done in pursuance of an agreement made at that time.[25] In the absence of an agreement what relation irregular indorsers on the same negotiable instrument bear to each other has been somewhat of a mooted question.[26] On principle if

Story, Prom. N., sec. 457. Many cases hold that the statute of frauds is not applicable to such indorsements. Houghton v. Ely, 26 Wis. 181; Harding v. Waters, 6 Lea (Tenn.), 331. But see 3 Kent, Comm. 122; Story, Prom. N. 457.

[14] Good v. Martin, 95 U. S. 90; Rey v. Simpson, *supra*; Sturtevant v. Randolph, 53 Me. 147; Jamaica Bank v. Jefferson, 92 Tenn. 537, 22 S. W. Rep. 242; Story, Prom. N., secs. 58, 59, 479; Randolph, Com. Pap., sec. 841. In Rey v. Simpson, *supra*, it was held that if he put his name on the back of the note at the time it was made as surety for the maker or for his accommodation to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered a joint maker as between him and the payee or *bona fide* holders. It has been held that the understanding between the parties to the immediate transaction was equally available against a third person as the payee. Shenk v. Robeson, 2 Grant's Cas. (Pa.) 372.

[15] Way v. Butterworth, 108 Mass. 509; Union Bank v. Willis, 8 Met. 504; Brawn v. Butler, 99 Mass. 179; Gibson v. Stephens, 124 Mass. 546. By statute (1874, ch. 404), the rule in Massachusetts was changed, and the liability is now that of an indorser. Nat. Bank v. Law, 127 Mass. 72; Lanaham v. Porter, 148 Mass. 599.

[16] Good v. Martin, *supra*; Rey v. Simpson, *supra*; Ives v. Bosley, 35 Md. 262, 6 Am. Rep. 411; Society v. Edmonds, 95 Tenn. 53, 31 S. W. Rep. 168; Story, Prom. N., sec. 479. Parol evidence is not admissible against *bona fide* holders. Chaffee v. Branner, 39 Ind. 383; Whitehouse v. Hanson, 42 N. H. 18; Randolph, Com. Pap., sec. 843.

[17] Pohle v. Dickmann, 67 Mo. App. 381.

[18] Good v. Martin, 95 U. S. 90; Provident Sav. L. Asso. Co. v. Edmonds, 95 Tenn. 53, 31 S. W. Rep. 168; Schultz v. Howard, 63 Minn. 196, 65 N. W. Rep. 363; Allison v. Kinne, 104 Mich. 141, 62 N. W. Rep. 152.

[19] Good v. Martin, 95 U. S. 90; Childs v. Wyman, 44 Me. 441, 69 Am. Dec. 111; Union Bank v. Willis, 8 Met. (Mass.) 504, 41 Am. Dec. 541; Randolph, Com. Pap., sec. 829.

[20] Colburn v. Averill, 30 Me. 310, 50 Am. Dec. 630; Grier v. Cable, 45 Ill. App. 405; Carr v. Rowland, 14 Tex. 275; Randolph, Com. Pap., sec. 829.

[21] McComb v. Thompson, 2 Minn. 139, 72 Am. Dec. 84; Good v. Martin, 95 U. S. 90; Parkhurst v. Vail, 73 Ill. 343; Bradford v. Prescott, 85 Me. 482; Randolph, Com. Pap., sec. 829.

[22] Johnson v. McDonald, 41 S. Car. 81; Champion v. Griffith, 13 Ohio, 228; Randolph, Com. Pap., sec. 829; Best v. Hoppie, 3 Colo. 137.

[23] Good v. Martin, *supra*; 2 Parsons, B. & N., sec. 124; Randolph, Com. Pap., sec. 829.

[24] Tenney v. Prince, 4 Pick. (Mass.) 385, 16 Am. Dec. 347; Killian v. Ashley, 24 Ark. 511, 91 Am. Dec. 519; Stagg v. Linnenfelser, 59 Mo. 336; Randolph, Com. Pap., sec. 843; Story, Prom. N., sec. 458.

[25] Moies v. Bird, 11 Mass. 436, 6 Am. Dec. 179; Childs v. Wyman, 44 Me. 433, 69 Am. Dec. 111. In Buck v. Hutchins, 45 Minn. 270, he is held as an indorser. But there seems to be still some uncertainty as to what liability is assumed under an indorsement subsequent to the delivery. 4 Am. & Eng. Ency. Law (2d Ed.), 494.

[26] Aiken v. Barkley, 42 Am. Dec. 297; Gillespie v. Campbell, 39 Fed. Rep. 724; McDonald v. McGruder, 3 Pet. 470; Marr v. Johnson, 9 Yerger (Tenn.), 1.

they are sureties as to the formal and original maker, in the absence of countervailing proof, they are not absolved, *inter sese*, from the obligations of suretyship, and the doctrine of contribution ought to obtain.[27] This position has the weight of authorities in its favor,[28] although early cases[29] were criticised in Gillespie v. Campbell.[30] In this case the doctrine of contribution was denied. In McDonald v. McGruder,[31] where the first indorser sought to recover contribution of the second indorser, Chief Justice Marshall denied that the doctrine obtained on the ground that there had been no communication between them, and declared that the rule of mercantile law making the liability several and successive prevailed. But in the late case in Tennessee, Logan v. Ogden,[32] where the second indorser sued the first indorser for the full amount of the note, the supreme court declared that "as between themselves alone they were joint sureties" for the original promisor. The court held that the position of their names on the back of the note was immaterial, and likewise the time of writing them there with respect to each other, and that each must contribute alike to the discharge of the obligation. And this position on the question is in conformity with the best judicial conception of to-day.

II. In some States the irregular indorser is treated and made liable as a guarantor.[33] By some authorities it is thought this is the soundest rule; that the purpose was to furnish additional security and to guarantee the payment of the note upon the failure of the maker to pay it.[34] Some courts hold that the statute of frauds does not apply to such cases, and others, to avoid the force and effect of it, hold that power is implied to the holder to fill out the guaranty over the indorsement.[35] As to what constitutes a consideration to support the contract of guaranty there is a difference of opinion among the authorities, but it seems a distinction is made between a person becoming a guarantor at the inception of the transaction, and one indorsing the note subsequent to its delivery, and *ipso facto* becoming liable as a guarantor. In the former case the original consideration is sufficient to support the indorsement;[36] whereas in the latter case a consideration other than the original must be shown.[37] But parol evidence is admissible to vary the liability at the suit of the payee.[38]

III. In other jurisdictions, neither of these doctrines obtain, but great significance is given to the position of the signature on the note.[39] The irregular indorser is held to be bound as a regular indorser, his rights and liabilities being determined by the rules governing legal indorsements.[40] In strict theory,

[27] Good v. Martin, *supra*; Camp v. Simmons, 62 Ga. 73; Pahlman v. Taylor, 73 Ill. 629; Lewis v. Harvey, 18 Mo. 74; Randolph, Com. Pap., sec. 839.

[28] Story, Prom. N., sec. 58; Donohue-Kelly B. Co. v. Bank, 52 Am. St. Rep. 57.

[29] Douglass v. Waddle, 13 Am. Dec. 630; Pitkin v. Flanagan, 56 Am. Dec. 61.

[30] *Supra*.

[31] *Supra*.

[32] 47 S. W. Rep. 489.

[33] Eberhart v. Page, 89 Ill. 550; Kingsland v. Koeppl, 136 Ill. 344; Boynton v. Pierce, 79 Ill. 145; Dietrich v. Mitchell, 43 Ill. 40, 92 Am. Dec. 99; Parkhurst v. Vail, 73 Ill. 343; Fullerton v. Hill, 48 Kan. 558; Firman v. Blood, 2 Kan. 496; Arnold v. Bryant, 8 Bush, 668; Van Doren v. Tjader, 1 Nev. 380. See Randolph, Com. Pap., sec. 838; 4 Am. & Eng. Ency. Law (2d Ed.), 491. In several of the States he is made liable as a guarantor by statute. Illinois (1883) R. S., ch. 98, sec. 8. In Iowa, it would seem he is made liable as a guarantor by statute. 1 McClain's Ann. Stat. (1880) 586, sec. 2089; Act of Kentucky Legislature, January 24, 1866.

[34] Tiedeman, Com. Pap., sec. 271; Randolph, Com. Pap., sec. 638; Story, Prom. N., sec. 460.

[35] Fuller v. Scott, 8 Kan. 254; Parkhurst v. Vail, 73 Ill. 343; Gungz v. Giegling (Mich.), 66 N. W. Rep. 48; Harding v. Waters, 6 Lea (Tenn.), 331; Story, Prom. N., sec. 457; Randolph, Com. Pap., secs. 838, 843. Original consideration held insufficient to bind him as a guarantor in Jones v. Ketler, 32 Tex. 717.

[36] Heinz v. Cahn, 29 Ill. 308; Carroll v. Weld, 13 Ill. 682; Kracht v. Obst, 14 Bush (Ky.), 34; Veech v. Thompson, 15 Iowa, 380; Story, Prom. N., secs. 457, 459; Randolph, Com. Pap., secs. 838, 843. *Contra:* Jones v. Ketler, *supra*.

[37] Killian v. Ashley, 24 Ark. 511; Tenney v. Prince (Mass.), 16 Am. Dec. 347; Good v. Martin, *supra*; Story, Prom. N., sec. 470; Randolph, Com. Pap., sec. 843. In some States the consideration of the guaranty must be expressed in writing. Van Doren v. Tjader, *supra*; Randolph, Com. Pap., sec. 843.

[38] Eberhart v. Page, 89 Ill. 550; Burton v. Hansford, 10 W. Va. 470; Randolph, Com. Pap., sec. 838; Story, Prom. N., sec. 459.

[39] Schafer v. Bank, 59 Penn. 144, 98 Am. Dec. 326; Haviland v. Haviland, 14 Hun, 627; Jones v. Godwin, 39 Cal. 493; Randolph, Com. Pap., sec. 834.

[40] Legislative enactments have given this character of liability to such indorsers. In England and Canada this result is reached by statutes, and he "incurs the liabilities of an indorser to a holder for value." Chalmers on Bills of Exchange, 108; Ayr American Plough Co. v. Wallace, 21 Can. Sup. Ct. Rep. 256. By the California Civil Code he is regarded as an indorser. Fessenden v. Sumner, 62 Cal. 484; Randolph, Com. Pap., sec. 836. In Connecticut (Gen. St., sec. 1860), he is made an indorser. Nor, it seems, can this character of indorsement be varied by parol evidence of a

applying the rules applicable to indorsements, if an indorser at all he is a second indorser, and he is held to be such in a number of States in the absence of evidence to the contrary.[41] Presumptively such an indorsement creates no liability in favor of the payee.[42] The payee must assume the responsibility of first indorser when the irregular indorser becomes liable to subsequent holders.[43] Indeed, the character and obligation of a second indorser seem to deny and negative the idea of liability to the payee, who is, in contemplation of mercantile law, the first indorser.[44] It is now generally admitted that in the absence of statutes having a contrary effect the true relation and intention of the parties at the time the transaction took place may be shown; and thus the liability of the indorser to the payee may be fixed and enforced.[45] But the second indorser will not be liable to the payee by reason of any agreement between the maker and the payee unknown to the indorser; the intention of the indorser must be considered also. And it is maintained, in the absence of statutes, that to make the second indorser liable to the payee the indorsement must have been made for the specific purpose of the maker obtaining credit with the payee, and in pursuance of an agreement to that effect.[46] In Pennsylvania, by reason of the statute of frauds, parol evidence is not admissible to change the liability of such an indorsement, which is fixed by the law merchant as that of a second indorser;[47] but such an indorser may be converted into a guarantor by an agreement in writing signed by him.[48] And in the absence of such a writing, the payee cannot sue the irregular indorser, and should an innocent holder recover from him he can sue the payee as first indorser.[49] Other authorities, while holding to the idea that such a person was an indorser, declared that he was nevertheless liable to the payee. In maintaining this character of liability, two theories were evolved to support it: One based upon a presumption of law and the interpretation of the contract upon its face, the other through extraneous evidence of intention or understanding of the parties as before shown. Judge Daniel[50] insists that the irregular indorser stands in the position of an accommodation drawer, and is, therefore, liable to the payee. Some courts have maintained that such an indorsement itself creates a liability of first indorser,[51] and that this presumption cannot be overcome by parol evidence.[52] In some States, where he is held liable as first indorser, it is necessary, under the statutes, before he can be charged as such, that notice of non-payment must be given him.[53] Then, in other States, the same result is reached by affirmatively showing through extrinsic evidence an intention of responsibility on the part of the indorser to the payee.[54] This course arose from the attempt of the courts to try to avoid the harsh results of the application and enforcement of mer-

different agreement. Spencer v. Allerton, 60 Conn. 410. In Massachusetts he is entitled to notice of non-payment. Nat. Bank v. Law, 127 Mass. 148.

[41] Keeling v. Vansickle, 74 Ind. 529, 39 Am. Rep. 101; Early v. Foster, 7 Black, p. 35; Browning v. Merritt, 61 Ind. 425; Holmes v. Preston, 70 Miss. 152; Phelps v. Vischer, 50 N. Y. 691, 10 Am. Rep. 433; Hindrie v. Kumer, 84 Hun, 141; Edison Gen. Elec. Co. v. Lebley, 72 Hun, 166; Casey v. Stewart, 30 N. Y. Supp. 808; Hall v. Newcomb, 42 Am. Dec. 82; Wade v. Creighton, 25 Oreg. 455; Dierng v. Creighton, 19 Oreg. 118, 20 Am. St. Rep. 800; Schafer v. Bank, 59 Pa. St. 144, 98 Am. Dec. 323; Slack v. Kirk, 67 Penn. 380; Hauer v. Patterson, 84 Penn. 274; Temple v. Baker, 3 L. R. A. 707; Newbald v. Boraef, 155 Penn. 227, 26 Atl. Rep. 335; Cody v. Shepard, 12 Wis. 639.

[42] Keeling v. Vansickle, 74 Ind. 629; Bogue v. Neleck, 25 Ill. 91; Randolph, Com. Pap., secs. 836, 837; Norton, B. & N., sec. 68.

[43] McPhillips v. Jones, 73 Hun (N. Y.), 516; Phelps v. Vischer, 50 N. Y. 69, 10 Am. Rep. 433. An indorsement of this kind *per se* creates no implied commercial contract whatever; so held in Chaddock v. Vanness, 35 N. J. L. 517.

[44] Randolph, Com. Pap., sec. 845.

[45] Blakeslee v. Hewitt, 76 Wis. 341; Moore v. Cross, 19 N. Y. 227, 75 Am. Dec. 326; Jaffray v. Brown, 74 N. Y. 393; Wade v. Creighton, 25 Oreg. 455; Randolph, Com. Pap., secs. 841, 845.

[46] Tillman v. Wheeler, 17 Johns. 326; Montgomery v. Schenck, 82 Hun (N. Y.), 24; Randolph, Com. Pap., sec. 837.

[47] Schaefer v. Bank, 59 Penn. 144, 98 Am. Dec. 323; Slack v. Kirk, 67 Penn. 380; Hauer v. Patterson, 84 Penn. 274; Newbald v. Boraef, 155 Penn. 227, 26 Atl. Rep. 305; Temple v. Baker, 3 L. R. A. 709.

[48] A memorandum in writing, signed by the irregular indorser, showing his responsibility to the payee, saves the statute. Eilbert v. Finkbeiner, 68 Penn. 243, 8 Am. Rep. 176.

[49] Temple v. Baker, 3 L. R. A. 709; Phelps v. Vischer, 50 N. Y. 69, 10 Am. Rep. 433.

[50] Neg. Insts., sec. 714.

[51] Price v. Lavender, 38 Ala. 389; Hooks v. Anderson, 58 Ala. 238, 29 Am. Rep. 745.

[52] Melton v. De Yamport, 3 Ala. 648; Price v. Lavender, *supra*; Reggs v. California, 2 Cal. 485, 56 Am. Dec. 356.

[53] California Civil Code, 3117; Fisk v. Miller, 63 Cal. 367; Randolph, Com. Pap., sec. 836; Lanahan v. Porter, 148 Mass. 596.

[54] Moore v. Cross, 19 N. Y. 227, 75 Am. Dec. 326; Moorman v. Wood, 117 Ind. 114; Norton, B. & N., sec. 68.

cantile law without evading it through any scheme of interpretation of the contract on its face; for it became obvious that to apply the strict rules governing indorsements would often mean the "enforcement of theory at the expense of justice."[55]

IV. In the foregoing discussion only negotiable paper has been considered. The same rule in several States which governs the liability of irregular indorsers on negotiable paper determines the liability of irregular indorsers on non-negotiable instruments;[56] but in New York, where an irregular indorser on a negotiable instrument is regarded *prima facie* as a strict indorser, such an indorser on non-negotiable paper is considered an original promisor.[57] In some other States he is presumptively liable as an original promisor.[58] And in still others it has been held that no presumptive liability is raised, but his liability is determined by the agreement or understanding of the parties when the indorsement was made.[59] Thus different doctrines obtain in different States. And, while it may be a bootless chase to search authorities for the purpose of endeavoring to evolve a settled principle touching the liability of an irregular indorser in this country, from the warring contention now encompassed by the sanctity of *stare decisis* in the respective States, yet, as between the parties, there seems to be a unanimity of opinion in holding admissible extraneous evidence of the intention of the parties at the time of the transaction, and in giving judicial force to that intent. The once dubious inference that commercial law alone did not furnish a solution of the problem, has become finally an obvious fact. Aside, however, from the admission of extraneous evidence on the contract, there seems to be no universal rule. But the understanding of the parties is frequently indefinite and unsatisfactory—the extraneous evidence being often of little aid to the court, which is thrown back upon the presumptive effect of the instrument. To meet the exigencies of all cases, the rule obtaining in the Supreme Court of the United States seems to furnish the remedy which more nearly than any other grants complete justice and conforms to the general belief, that as to the payee and *bona fide* holders the irregular indorser is a *prima facie* maker, and as to the original and formal maker, a surety. Certainly this doctrine is more in conformity with the general understanding and current beliefs in the centers of commerce, from which the rules of the law merchant largely grew, and it contains a more engaging and persuasive equity than the other doctrines.

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[55] Norton, B. & N., sec. 68; Randolph, Com. Pap., sec. 841.

[56] Castle v. Candle, 16 Conn. 223; Cooley v. Lawrence, 4 Martin (La.), 274; Rothschild v. Grix, 31 Mich. 150, 18 Am. Rep. 171; Lewis v. Harvey, 18 Mo. 74, 59 Am. Dec. 286; Carr v. Rowland, 14 Tex. 275.

[57] Cromwell v. Hewitt, 40 N. Y. 492, 100 Am. Dec. 527; Richards v. Warring, 39 Barb. 42.

[58] Pool v. Anderson, 116 Ind. 88; Gorman v. Ketchum, 33 Wis. 427; Houghton v. Ely, 26 Wis. 181, 7 Am. Rep. 52.

[59] Crawford v. Lytle, 70 N. Car. 385; Tear v. Dunlap, 1 Greene (Iowa), 331. See also Leech v. Hill, 4 Watts (Penn.), 448.

WILLS—PERPETUITIES.

TINGIER v. CHAMBERLIN.

Supreme Court of Errors of Connecticut, March 9, 1899.

Under the statute against perpetuities (Gen. St. 1888, § 2952), making void a devise to the descendants of persons unborn at the testator's death, a devise "to those persons who are the natural heirs at law" of a third person at his death is void.

Hammersley, J., dissenting.

TORRANCE, J.: The facts found in the presen case are substantially the same as those stated in 70 Conn. 363, 39 Atl. Rep. 734, when, in another phase of it, this case was before this court; and for the purposes of this case it is unnecessary to recite them here at length. The plaintiff is administrator *de bonis non*, with the will annexed, both upon the estate of Eunice Chapman and upon the estate of Elijah S. Chapman, her husband. Elijah S. Chapman died in March, 1879, leaving a will, the material portions of which were as follows: "Second. I give, devise, and bequeath unto my beloved wife, Eunice Chapman, the use and improvement, rents, profits, and income, of all my estate, real and personal, and wheresoever the same may be situated; to her during her natural life. Third. I give, devise, and bequeath all my said estate, at the decease of my said wife, unto such person or persons, and in such shares or portions, as my said wife, Eunice Chapman, by her last will and testament, duly executed, shall name, designate, and appoint (provided she shall not give the same to Otis and Ambrose D. Snow, or either of them); to them and their heirs forever." He left surviving him Eunice, his widow, and three children,—Adeline, wife of Ambrose Snow, Mary, wife of Otis Snow, and Doremus. Eunice, the widow, died in April, 1884, leaving a will, in which she gave all the estate of her husband of which she had the power to dis-

pose under his will, and all her own estate, to a trustee, in trust to pay over the net income to her son, Doremus, during his life, with power in the trustee to appropriate and apply, in his discretion, so much of the principal of the trust estate, for the purposes of the trust, as he should deem necessary. The trust estate that might remain at the death of Doremus she disposed of as follows: "Fourth. If, upon the decease of my said son, Doremus D. Chapman, any portion of said trust estate shall be remaining in the hands of said trustee, undisposed of, I authorize and direct said trustee to distribute, transfer, and convey all said remaining estate, absolutely to such persons as would then be entitled to the same as heirs at law of the said Doremus D. Chapman, if said estate belonged to him, under the statute laws of the State of Connecticut then in force, if the same were intestate estate; that is to say, said trustee shall distribute said estate as aforesaid to those persons who are the natural heirs at law of my said son at the time of his decease." She left surviving her the three children aforesaid, and three grandchildren, children of her daughter Mary, all of whom, with the exception of her son, Doremus, are now living. Doremus, after the death of his mother, married, and subsequently, in December, 1896, died, without ever having had any child born to him. He left a widow, who is still living, and a will by which he gave all of his estate to his widow. The duly qualified executor of his will and his widow are made parties to this suit. The trust estate, the life use of which was given to Doremus consisted of the estate of his father, Elijah S. Chapman, and the estate of his mother, Eunice Chapman, including both real and personal estate; and what remained of both of said estates is now in the possession and control of the plaintiff, to be disposed of according to law. The complaint sets forth several questions, concerning which it is alleged that the plaintiff is in doubt; but they may all be resolved into this single question, namely, whether the disposition of what remains of these estates after the death of Doremus, contained in the will of Eunice Chapman, does or does not contravene the provisions of the statute of perpetuities in force when her will took effect, in April, 1884.

Under the will of her husband, Mrs. Eunice Chapman had the power to dispose by will of the remainder of her husband's estate, after her life use thereof, to such persons, except Otis and Ambrose D. Snow, and in such portions, as she pleased; and under the law, of course, she had the power to dispose of her own estate by will as she chose. By her will she gave her son, Doremus, through her trustee, the life use of the property belonging to both estates, and concerning this disposition of such property no question is made in the present case. She further provided in her will that what remained of this property after the death of Doremus should go as follows: "To those persons who are the natural heirs at law of my said son at the time of his decease." Whether this is a valid or a void disposition is substantially the only question in the case, and its validity must be determined by the law as it was when her will took effect, in 1884. Security Co. v. Snow, 70 Conn. 288, 292, 39 Atl. Rep. 153. At that time the statute against perpetuities (section 2952, Gen. St. 1888) was in full force, though it has since been repealed. Pub. Acts 1895, ch. 249. Under this statute, as construed by this court, the issue or descendants of persons unborn at the death of a testator cannot take under his will; and a gift, devise, or bequest which may by possibility offend against the statute in this respect is void and of no effect. This has been the construction put upon the statute, whenever its construction has been before this court, for a period of nearly 70 years,—from the decision in Allyn v. Mather, 9 Conn. 114, in 1832, down to that in Security Co. v. Snow, *supra*, in 1898. This uniform construction for so long a period has acquired the force of a fixed rule of property, and is no longer open to doubt or question. If a gift, devise, or bequest offends against the statute as thus construed, it is void and of no effect. That the disposition here in question does thus offend against the statute is clear, beyond all question. The testatrix used the words "heirs at law" of Doremus, not as meaning his children, but in their natural and proper sense, as including all those persons who shall be capable of inheriting from him, or taking his property under the statute of distributions, if he died intestate. In the clause under consideration, those who are to take are expressly, and with great precision, described as his heirs at law, in the strictly technical sense of those words; and there is nothing in any other part of the will which in any way qualifies or modifies this descriptive language. Under such a description, all of the property remaining of both estates may go to the issue or descendants of persons not in being when the testatrix died, and the gift over is therefore void.

The superior court is advised that the disposition made in the fourth clause of the will of Eunice Chapman to the heirs at law of Doremus is void, and that the property in the hands of the plaintiff belonging to the estate of Eunice Chapman and to the estate of Elijah S. Chapman is intestate estate, and is to be dealt with and disposed of as such. The other judges concurred.

NOTE.—One of the judges of the court dissents from the conclusion of the majority in the principal case. "The testatrix," he says "seeks to give her son the full benefit of her property, only restraining his power of alienation, so that at his death it shall go to his heirs. Such a devise is, and always has been, valid under the common law of this State. Larabee v. Larabee, 1 Root, 555; Hamilton v. Hemsted, 3 Day, 332, 338; Healy v. Healy, 70 Conn. 467, 471, 39 Atl. Rep. 793. A devise to a son for life, and upon his death to his heirs, is one of the most natural and most common provisions made by will. To forbid such a devise is an unnatural and unjustifiable alteration of the law of property. It is said that such an alteration was made by a statute first enacted in 1784. No intimation of

this result can be found in the language of the statute. It was passed in affirmation of the common law, to avoid pepetuities. Revision 1875, p. 352, § 3; Welles v. Olcott, Kirby, 118; Chappell v. Brewster, *Id.* 175; Allyn v. Mather, 9 Conn. 114, 130; 1 Swift, Syst. Laws Conn. pp. 247, 249, 267. The meaning now attributed to it is in violation of the common law, and subversive of the foundation on which the rule against perpetuities rests."

Recent Decisions on the Creation of Future Contingent Interests in General.—Code, sec. 1920, declaring void every disposition of property which suspends the absolute power of controlling it for more than a certain period, applies merely to the vesting of an estate, and does not affect its continuance after it has vested. Phillips v. Harrow (Iowa), 61 N. W. Rep. 434. A legacy conditioned that the legatee shall pay all premiums on a policy of life insurance procured by testatrix for the benefit of her adopted son, and that such insurance, or some part thereof, shall be actually paid to the adopted son within one year from her decease, though future and contingent, vested as a right, and could be sold by the legatee at any moment after the death of the testatrix, and did not suspend the power of alienation. Sawyer v. Cubby, 146 N. Y. 192, 40 N. E. Rep. 869. Testator devised the residue of his estate to trustees, the trust to continue until the death of the last of his five children. One-half of the income was to be paid to his children, and on the death of his last child the estate was to be divided equally among his "grandchildren and their heirs." Held, that the provision for the grandchildren violated the statute of perpetuities, as the title to the remainder did not vest in the grandchildren as a class at testator's death, but vested on the termination of the trust in the grandchildren then living and the heirs of any deceased grandchild. Morris v. Bolles, 65 Conn. 45, 31 Atl. Rep. 538. Testator, after devising to his wife the whole, or so much as she might need, of the income of his estate devised in trust, directed the residue of the income to be paid during the continuance of the trust in equal shares to his seven children, and in case of the death of any child, his distributive share of such income to be paid to his "heirs and legal representatives," who were to take "by way of representation." He then provided that upon the death of the last survivor of his wife and children the residuary estate should be conveyed in equal shares to the "heirs and legal representatives" of the children, who were to take "by way of representation." Held, that the provision for the benefit of the "heirs or legal representatives" of the children was void as violating the statute of perpetuities. Ketchum v. Corse, 65 Conn. 85, 31 Atl. Rep. 486. A clause directing that the estate devised to testator's children, should be held in trust, the income to be paid to the children during their lives, but that on the death of any child the portion willed to him should descend to his child or children, and if any one of testator's children died without issue his portion should be divided among testator's surviving children, does not conflict with the rule against perpetuities. Davenport v. Kirkland (Ill. Sup.), 40 N. E. Rep. 304. Stocks were devised to testator's son, to be held in trust 10 years, then to be delivered to him; if deceased, then to his son; if both were deceased before the 10 years have expired, then to be transferred to his daughters L and M; if either daughter was deceased, her portion was to be transferred to the remaining daughter; if both were deceased, then to certain others. Held, not to create a trust which suspends alienation for a longer period than two lives in being. Montignani v. Blade (N. Y. App.), 145 N. Y. 111, 39 N. E. Rep. 719. A devise to an executor in trust, which directs that land be sold at a certain time, less than a year after the execution of the will, does not violate the statute against perpetuities, by suspending the power of alienation for a period not measured by lives, as the direction is advisory, and does not limit the power of absolute disposition. Deegan v. Wade, 144 N. Y. 573, 39 N. E. Rep. 692. A bequest to testator's wife and son, and, in case they die before the son's majority, then to testator's heirs, is not in violation of Code, sec. 1920, declaring void every disposition of property which suspends the absolute power of controlling it for more than the lives of persons in being, and 21 years thereafter. Jordan v. Woodin (Iowa), 61 N. W. Rep. 948. Testator bequeathed one-half of his residuary estate to his daughter M for life, to go at her decease to her children, "and the legal representatives of any of them who may then have deceased," and their heirs. The other half he bequeathed to his daughter J for life, to go, at her death, to her children and the "descendants" of any deceased child, but, in case J left no descendants, then such portion to go to the children of M, and the "legal representative" of any one of them then deceased, and their heirs, subject only to a life estate in one-third thereof to J's husband, if he survived her. At testator's death he had but two grandchildren, daughters of M. Held, that the bequests over, after the life estates to testator's daughters, were not void as against the statute of perpetuities; and hence the whole residuary estate, on testator's death, vested (so far as to constitute a transmissible estate) in M's daughters, subject only to the life estates, and to the contingency of J's leaving descendants surviving. Johnson v. Edmond, 65 Conn. 492, 33 Atl. Rep. 503. A provision in a will that, on the termination of certain trusts created thereby, the trust fund should go to the "then" lineal descendants, is void, under Gen. St. sec. 2952, which declares that no estate shall be given by will to any persons but such as are, at testator's death, in being, or to their immediate descendants. Johnson v. Webber, 65 Conn. 501, 33 Atl. Rep. 506. A devise in trust, for the use and benefit of G "and his family," until G shall discharge his present liabilities, whereupon the trustees are to convey to him whatever may then remain in their hands, does not violate the common-law rule against perpetuities, since the trust must be understood as limited to the family of which G is and remains the head, and cannot endure beyond his life. St. John v. Dann, 66 Conn. 401, 34 Atl. Rep. 110. In a devise in trust, for the use and benefit of G "and his family," until G shall discharge his liabilities, whereupon he is to have the property absolutely, the word "family" will be construed as meaning those persons in being at testator's decease, or the children of such persons, so as not to violate Gen. St. sec. 2952, against perpetuities. St. John v. Dann, 66 Conn. 401, 34 Atl. Rep. 110. A testator, in a will executed and probated in South Carolina, provided that "the rest and residue of my estate, both real and personal, be equally divided among all my children, and, if either of my children should die without issue, his or her part to return to my estate, and be divided as the rest and residue of my estate." Held that, construing the will according to the decisions of that State, the limitation over was void for remoteness. Adams v. Farley (Miss.), 18 South. Rep. 390. A will, giving the income of testatrix's estate to her husband and daughter for life, and the estate to the daughter's children, to be divided among them on their becoming 21 years old, and, in the event of the daughter's leaving no issue, giving

the estate to others, does not violate the statute against perpetuities, the children taking a vested estate, defeasible by condition subsequent. Shannon v. Pentz, 37 N. Y. S. 304, 1 App. Div. 331. A will gave a fund in trust to pay the income to testator's two grandchildren, equally, for their respective lives, and on their several deaths in trust as to the *corpus* for the use of such of their children as should be living at their death, and the issue *per stirpes* of any who should be dead; and, in case either of said grandchildren should die without leaving any children or issue of any deceased child living at such death, or if, leaving such child or issue, all of them should die under the age of 21, without issue, then the part intended for the one so dying should go to the survivor of such grandchildren. Held that, as the limitation over was not upon the death of issue generally, but the issue intended were only those of a child who had died in the lifetime of a grandchild, and either of the two alternative contingencies must happen within 21 years after the end of a life which was in being, the limitation was not too remote. *In re* Weinbrenner's Estate (Pa. Sup.), 173 Pa. St. 440, 34 Atl. Rep. 215. Testator devised land to his daughter "and the heirs of her body," but provided that, if she died "without issue," the property should revert back into testator's estate, "and be equally divided among my surviving legatees." Held, that the limitation over was not void for remoteness, and might therefore be sustained as an executory devise. Selman v. Robertson (S. Car.), 24 S. E. Rep. 187. Testator created, in favor of certain unborn beneficiaries, to take effect in a prescribed event, contingent, executory interests in a residuary fund in trust by executory devise and bequest in fee-simple and in absolute ownership. Held, that the common-law rule against putting the freehold in abeyance, and against creating freehold estates to commence in future, does not apply, and that such equitable executory interests remain with the legal estate vested in the trustees, until the time comes for them to vest in right or in enjoyment, when they spring up as an original whole. Carney v. Kain (W. Va.), 40 W. Va. 758, 23 S. E. Rep. 650. In a will creating a trust fund, the income to be paid to a son of the testator during his life, and the principal to be paid over to his heirs, by the trustees after his death, a further provision that, in case of his death without living heirs of his body, the fund should be divided among other children of the testator, is good as an executory bequest, being limited upon a definite failure of issue of the first taker. Glover v. Condell, 163 Ill. 566, 35 L. R. A. 360, 45 N. E. Rep. 178. A devise to testator's son D, "and his heirs forever, but, in case he should die without issue of his body, then the same shall go to the heirs of N, to them and their use forever," vests in D a fee, determinable on his dying without children surviving him; and hence the limitation over, being upon a definite failure of issue, is valid as an executory devise. Strain v. Sweeney (Ill. Sup.), 163 Ill. 603, 45 N. E. Rep. 201. Testator bequeathed his property in trust to his executors to pay to his daughter an annuity of $600, and on her death to her children an annuity of $300 each until they arrived at the age of 25 years, at which time there should be paid to each child, as he arrived at that age, $10,000. If, at the death of the daughter, any of her children were of the age of 25 years, the said sum should be paid in lieu of the annuity. At the termination of the trust as to all the beneficiaries and remainder mea, the property should be divided among the grandchildren then living. Held that, as the trust might, in case children were born to the daughter after testator's death, be extended beyond a life in being and 21 years thereafter, it was void, as contrary to the rule against perpetuities. Lawrence v. Smith, 163 Ill. 149, 45 N. E. Rep. 259. A future estate or interest which may be destroyed at the will of the owner of the property cannot infringe the rule against perpetuities. Pulitzer v. Livingston, 89 Me. 359, 36 Atl. Rep. 635. The residuary clause of a will devised the rest of testator's estate to a church building society, requiring "as a condition of the vesting of this legacy that the said residuary legatee shall release all claim which it has against, and shall execute a release thereof." Held, that a present estate was intended, the condition requiring only that when the executors should put the legatee in possession it was to execute the required release, and the clause was not objectionable as creating a perpetuity by a condition precedent. Congregational Church Bldg. Soc. v. Everett (Md.), 85 Md. 79, 35 L. R. A. 693, 36 Atl. Rep. 654. A devise of land to be used by the devisee for a certain purpose "forever," and whenever the devisee shall cease to use the land for such purpose "the same shall revert to my heirs at law," gave the devisee a qualified fee in the land, and therefore the statute against perpetuities does not apply. Loughreed v. Dykeman Baptist Church & Society (Sup.), 40 N. Y. S. 586. A bequest to a trustee to pay the income to R until 45 years old, and then turn over the property to him, but if he should die before reaching the age of 45 years, leaving a widow, to pay one half of the income to her so long as she should remain his widow, suspends the power of alienation longer than two lives in being (1 Rev. St. p. 773, sec. 1), where R was not married at the time of testator's death, since he might marry some one who was not born at the time of testator's death. Durfee v. Pomeroy, 40 N. Y. S. 1022, 7 App. Div. 431. Testator, after making certain provisions for his daughter and his son, R, gave the residue of his estate to his executors in trust to pay one-half of the income to R until 45 years old, and then to transfer one-half of such residue to him, or to his children, if any, should he die before attaining the age of 45 years. The will further provided that should R die within the period, leaving a widow but no children, the widow should have one-half of the income which R had enjoyed, so long as she remained his widow. Held, that testator's evident intent was to provide for his children during their lifetime, and to secure his property to his grandchildren, and therefore the provisions in favor of R's widow could not be withdrawn from the trust so as to take it out of the operation of the statute of perpetuities. Durfee v. Pomeroy (Sup.), 40 N. Y. S. 1022, 7 App. Div. 431. A devise in trust of realty and personalty to apply the income to the maintenance and education of testator's children, two of whom are minors, and to divide the property equally among the children, as soon as the youngest reaches the age of 21 years, will not fail because the trust estate is not made dependent on a life or lives in being, but on a term of years, since the court will imply an alternative, and make the trust terminable on the majority of the minor on whose life the suspension is limited, or his earlier death. Becker v. Becker (Sup.), 43 N. Y. S. 17, 13 App. Div. 342. Where, as to a devise over, a testator has expressed with clearness one limitation to take effect at a period far within the lawful limits, it will be held good as a remainder, though an alternative disposition be objectionable as an executory devise, on the ground of remoteness. Halsey v. Goddard, 86 Fed. Rep. 25. A devise limiting the remainder of a trust estate to the lawful heirs of the *cestui que*

trust is void, because contrary to the statute of perpetuities. Security Co. v. Snow, 70 Conn. 288, 39 Atl. Rep. 153. A bequest of the use of one-twentieth of the remainder of the estate to A, at his decease to go to his legal heirs, is not obnoxious to the common-law rule against perpetuities. Healy v. Healy, 70 Conn. 467, 39 Atl. Rep. 793. Where land is devised to 17 persons for life, with six life estates in remainder, all but one of which will vest during the lives of said 17 persons, and the remaining one within 21 years after the death of a person alive at the testator's death, the devises are not void as creating a perpetuity. Madison v. Larmon, 170 Ill. 65, 48 N. E. Rep. 556. A devise of land "to W, to be distributed by her among her descendants, children and grandchildren, according to her discretion," is not void as being within the rule against perpetuities. Woodbridge v. Winslow, 49 N. E. Rep. 738. Testator gave national bank stock to the bank's cashier, in trust to distribute the dividends to designated employees during the corporate existence of the bank, "either under its present charter, or by virtue of any renewals or extensions thereof." The bank was incorporated on June 19, 1865, for the period of 20 years, and its existence was extended 20 years under the federal law of 1882. Testator died in November, 1891, and no law then or has since existed authorizing any further extension. Held, that the gift violated the rule against perpetuities, and was void, in that the trust might not be completely performed in 21 years. Siedler v. Syms, 38 Atl. Rep. 424. A devise to trustees, to hold and manage for 75 years, and annually pay the income to testator's children, does not violate the rule against perpetuities; the estate, both legal and equitable, being vested at once. *In re* Johnston's Estate, 185 Pa. St. 179, 39 Atl. Rep. 879. A devise of a remainder to testator's children that may be living 75 years after his death, and the legal descendants of any of his children then dead, such descendants to take such portion as their deceased parent would have taken if then living, is void, as creating a perpetuity; the estate being contingent by reason of the uncertainty as to the persons who will take, which cannot be eliminated before the expiration of 75 years. *In re* Johnston's Estate, 185 Pa. St. 179, 39 Atl. Rep. 879. A power of sale given to trustees, to be exercised 75 years after testator's death, is void, as violative of the law as to perpetuities. *In re* Johnston's Estate, 185 Pa. St. 179, 39 Atl. Rep. 879. A bequest of a certain sum to a priest of a certain church, requiring the income to be used in ornamenting testator's burial lot, is invalid as a gift in perpetuity for a private trust. Sherman v. Baker, 40 Atl. Rep. 11. Testator, who, with his wife, was well advanced in years, and had but one child, grown to womanhood and married, gave, after termination of life estate to his wife, a life estate to his daughter, with remainder to the heirs of her body, with provision that if she die "leaving no heirs of her body, or should I at any future time fail to have heirs of my body," then the property shall go to a church; and further provision that the church is not to have any interest in the property till after the death of his wife and daughter, and not then unless his daughter dies, leaving no heirs of her body. Held, that by the words, "or should I at any future time fail to have heirs of my body," testator meant only his daughter, and such as might descend through her, and did not contemplate another line of heirs of his body; so that the devise over to the church did not contravene the law against perpetuities. *In re* Wells' Estate, 69 Vt. 388, 38 Atl. Rep. 83.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION—Administrator De Bonis Non.—Under Horner's Rev. St. 1897, § 2240, imposing on an administrator *de bonis non* the same rights and liabilities as the administrator first appointed, he cannot bring a common-law action against the estate of his predecessor for a conversion of the trust assets. His remedy is under section 2458, which authorizes him to sue on the predecessor's bond for such misappropriation.—ORMES' ESTATE v. BROWN, Ind., 52 N. E. Rep. 1005.

2. ALTERATION OF INSTRUMENTS.—The alteration of a note, before delivery, to make it conform to the intention of all the parties, does not release the sureties therein, though made without their knowledge.—MATTINGLY v. RILEY, Ky., 49 S. W. Rep. 799.

3. APPEAL—Bill of Review.—The Code has abrogated the old remedy by bill of review on the ground of newly-discovered facts. If the discovery is made before the expiration of one year after verdict or finding, a motion for new trial will lie (Rev. St. 1898, § 2879); if the discovery is not made until after the year has expired, there is no remedy, unless the newly-discovered facts show fraud or collusion, in which case a direct action will lie.—CROWNS v. FOREST LAND CO., Wis., 78 N. W. Rep. 433.

4. APPEAL—Judgment.—A party cannot appeal from a judgment in his favor for a less sum than he claimed.—NORTHROP v. JENISON, Colo., 56 Pac. Rep. 187.

5. ASSIGNMENTS—Account Stated.—The offer to transfer a mortgage in payment of a debt is not an offer to compromise, so as to be inadmissible in evidence, in the absence of any such suggestion. A debtor who pays the debt to the original creditor, after notice of an assignment of the debt, is not absolved from liability to the assignee.—FERGUSON v. DAVIDSON, Mo., 49 S. W. Rep. 859.

6. ASSIGNMENT—Evidence—Notice.—In order that a notice to a debtor of an assignment of the debt should be effective, it must be so exact as to convince the debtor that he is no longer liable to the original creditor; and, where certificates of an architect are issued to a contractor, general information that the creditor was likely to borrow on the credit thereof, or mere suspicion that he might have made an assignment of them to others, is insufficient to render the debtor liable to persons to whom they were assigned.—SKOBIS v. FERGE, Wis., 78 N. W. Rep. 426.

7. ASSIGNMENT FOR CREDITORS—Right of Foreign Assignee to Sue.—An assignee under a deed of assignment for the benefit of creditors, executed in Ohio, may, without executing bond in Kentucky, maintain an action in the courts of that State for the recovery of the possession of personal property which passed under the deed of assignment.—PEACH ORCHARD COAL CO. v. WOODWARD, Ky., 49 S. W. Rep. 793.

8. ATTACHMENT—Dissolution.—A court is without authority to hear and determine a motion to discharge an attachment filed before judgment in the action, but not submitted until after judgment.—HERMAN v. HAYES, Neb., 78 N. W. Rep. 365.

9. BILLS AND NOTES—Action on Note—Evidence.—In an action between an indorsee of a promissory note and the maker, the admissions or statements of the indorser, made subsequent to the indorsement, may not be received in evidence to impeach the validity or weaken the force of the indorsement or the transfer of title evidenced by it.—ZIMMERMANN v. KEARNEY COUNTY BANK, Neb., 78 N. W. Rep. 366.

10. BILLS AND NOTES — Indorsement.—An indorsement of negotiable paper, "Estate of Wheeler, Wing, Executor," does not bind the executor individually, though the estate may not be bound.—GRAFTON NAT. BANK v. WING, Mass., 52 N. E. Rep. 1067.

11. BOARDS OF EDUCATION—Powers.—A board of education has power to contract with an architect to prepare general drawings and specifications for a school house, as a preliminary to determining whether a building, and, if so, what kind, shall be constructed, although, for want of funds devoted to building purposes, it may at that time have no power to erect the building.—FISKE v. SCHOOL DIST. OF CITY OF LINCOLN, Neb., 73 N. W. Rep. 392.

12. CARRIERS—Goods—Connecting Lines.—A railroad bill of lading for cotton shipped from Texas to Liverpool provided that responsibility on the part of such railroad should cease "upon delivery of said cotton to its next connecting carrier," and, in case of loss or damage, "that carrier alone shall be held liable therefor in whose actual custody" the cotton shall be at the time of such damage or loss. The railroad transported the cotton to New Orleans, and unloaded it on its own wharf, from which it was to be loaded upon the steamship of a connecting carrier, and gave notice to such carrier that the cotton was ready to be taken by it. The cotton was destroyed by fire while on the wharf, and before the arrival of the vessel. Held, that such loss occurred while the cotton was in the "actual custody" of the railroad company, and it was liable therefor, under the bill of lading.—TEXAS & P. RY. CO. v. CLAYTON, U. S. S. C., 19 S. C. Rep. 421.

13. CARRIERS—Passenger — Imminent Danger.—The liability of a railroad company, where a passenger jumped from one of its cars when a collision seemed imminent, is to be measured by what a prudent person would have done under like circumstances.—CHITTY v. ST. LOUIS, I. M. & S. RY. CO., Mo., 49 S. W. Rep. 868.

14. CARRIERS OF PASSENGERS — Negligence — Ordinance.—The violation of a municipal ordinance, regulating the running of street cars, resulting in an injury to a passenger, cannot be made the basis of a civil liability by a mere allegation that such ordinance was in force and binding on defendant, since it must be alleged and proven that defendant agreed to be bound by the ordinance.—BYINGTON v. ST. LOUIS R. CO., Mo., 49 S. W. Rep. 876.

15. CERTIORARI—Effect of Writ.—A writ of *certiorari* to review an order of a lower court merely suspends the execution of the order so as to prevent any act being done to enforce it, and the giving of notice of the entry of the order so as to set the time running within which to settle a bill of exceptions is not prevented by the issuance of the writ.—STATE v. BURNELL, Wis., 78 N. W. Rep. 425.

16. CHATTEL MORTGAGES—Record—Notice.—A junior mortgagee, who takes his mortgage with actual notice of the existence of another mortgage upon the same property, and with the understanding that the lien of his mortgage is subject to that of such former mortgage, is not entitled to precedence on the grounds that such former mortgage was not filed of record in the proper county recorder's office prior to the time that his mortgage was filed in such office.—WELLS, FARGO & CO. v. ALTURAS COMMERCIAL CO., Idaho, 56 Pac. Rep. 165.

17. CHATTEL MORTGAGES—Signing in Blank.—On the issues whether a chattel mortgage in suit was executed in blank, with the understanding that the blanks should be filled by the mortgagee, and whether he exceeded the authority thus impliedly given, so as to avoid the instrument, the situation of the parties and all that was said when the authority was given are competent evidence.—SMITH v. JAGOE, Mass., 52 N. E. Rep. 1088.

18. CHATTEL MORTGAGES—Title—Replevin.—On condition broken, the legal title to mortgaged chattels vests in the mortgagee, especially where he secures possession, though he is deprived of it again by a forthcoming bond.—CROCKER v. BURNS, Colo., 56 Pac. Rep. 199.

19. CONSTITUTIONAL LAW — Due Process of Law.—A State statute providing that whenever any railroad company shall discharge a servant or employee, with or without cause, it shall, on the day of discharge, under certain penalties, pay him the unpaid wages earned at the contract rate at the time of discharge, without discount on account of payment before such wages were payable under the contract of employment (Acts Ark. 1889, p. 76), does not operate as a deprivation of property without due process of law, where the railroad company is incorporated under the State laws, and the State constitution reserves to the legislature the power to amend or repeal all charters of incorporation.—ST. LOUIS, ETC. RY. CO. v. PAUL, U. S. S. C., 19 S. C. Rep. 419.

20. CONSTITUTIONAL LAW — School Districts.—Under Const. art. 5, § 25, forbidding the legislature to pass local or special laws for the management of common schools, a law general in character, but designed to authorize particular school districts organized under the general school law to consolidate with others organized under special charter, is invalid, though it provides the method to be pursued by the electors in effecting the consolidation.—IN RE SENATE BILL, Colo., 56 Pac. Rep. 173.

21. CONSTITUTIONAL LAW — Vested Rights.—Where a law imposing a new condition on a common-law right of action does not provide for existing rights of action, and yet uses general language applicable to such rights, the court must apply it, or not, to pre-existing rights, according as it shall judicially appear that a reasonable time was left after it took effect for the particular person affected to perform the condition.—RELYEA v. TOMAHAWK PULP & PAPER CO., Wis., 78 N. W. Rep. 412.

22. CORPORATIONS — Authority of Agent.—A foreign corporation, which consented that the general manager of its affairs in this country might buy land in his name as "trustee," in which name he was accustomed to transact its business, is liable for the price of the land, though its agent was to hold the title only until the formation of another corporation, to which the title was to be transferred.—HURST v. AMER. ASSN., Ky., 49 S. W. Rep. 800.

23. CORPORATIONS—Contracts between Directors.—A corporation organized for the purpose of buying land and selling it out in lots is not bound by a contract between its president and secretary by which the secretary was to have a certain commission on each lot sold for the company, but is liable only for a reasonable commission on the amount actually received from such sales, the officers making the contract both being directors.—LOUISVILLE BLDG. ASSN. v. HEGAN, Ky., 49 S. W. Rep. 796.

24. CORPORATIONS—Foreign Corporations—Process.—Under Act 1887, ch. 226, authorizing suit against any

non-resident corporation found doing business in the State through any agency acting for it, by services on any person who represented the corporation when the transaction in suit occurred, an action does not lie where the corporation had ceased to maintain agencies in the State, though the agent who performed the transaction remained in the State, and was served.—GUTHRIE v. CONNECTICUT INDEMNITY ASSN., Tenn., 49 S. W. Rep. 829.

25. CORPORATIONS—Liability for Services Rendered in Organization.—A corporation is liable for necessary services rendered in its organization, the benefit of which it has accepted.—FARMERS' BANK OF VINE GROVE v. SMITH, Ky., 49 S. W. Rep. 810.

26. CORPORATIONS — Stock.—Assuming it to be the right of a stockholder in a corporation to examine the books thereof, it is not, as a matter of law, his duty to do so, after becoming a stockholder, for the purpose of ascertaining whether or not he has been defrauded in the purchase of such stock; he not being aware of any fact leading to a suspicion that he may have been so defrauded.—GERNER v. MOSHER, Neb., 78 N. W. Rep. 384.

27. COURTS—Supreme Court—Jurisdictional Amount.—Where several defendants were sued separately by the same plaintiff, and there was no consolidation, and separate judgments were rendered for plaintiff, and separate appeals taken, the amounts of the judgments cannot be aggregated so as to give the supreme court jurisdiction (Const. art. 6, § 12), though the same issues are involved, and the cases were tried together, and it was stipulated that they might be heard on one record, statement, and brief.—BRADLEY v. MILWAUKEE MECHANICS' INS. CO., Mo., 49 S. W. Rep. 867.

28. CRIMINAL PRACTICE—Homicide—Indictment.—An indictment for homicide, charging that accused feloniously, willfully, deliberately, premeditatedly, and with malice aforethought assaulted deceased with a pistol, which he feloniously, willfully, deliberately, premeditatedly, and with malice aforethought discharged at him, thereby feloniously, willfully, deliberately, premeditatedly, and with malice aforethought striking, penetrating, and wounding deceased, sufficiently charges that the wounding was felonious and deliberate.—STATE v. KINDRED, Mo., 49 S. W. Rep. 845.

29. DEATH BY WRONGFUL ACT—Right of Adult Children to Sue.—Though Gen. St. ch. 57, § 3, giving a right of action to "the widow, heir or personal representative" of any person killed by the willful neglect of another, authorizes a recovery only where there is a widow or child, adult as well as minor children may sue.—PENNSYLVANIA CO. v. MALIA, Ky., 49 S. W. Rep. 809.

30. DEED—Delivery—Unborn Person as Grantee.—An unborn child does not take under a deed to "I and his brothers and sisters," though I is the grantor's only living child, and there is expectation of another in a few days.—MORRIS v. CAUDLE, Ill., 52 N. E. Rep. 1036.

31. DEED BY INDIAN—Consent of President.—Where a deed by an Indian, who had no power of alienation without permission of the president of the United States, was recorded in Illinois without the president's permission indorsed thereon, the record is notice to subsequent purchasers, under Conveyancing Act Ill. § 30, that the grantor had at least attempted to convey.—LOMAX v. PICKERING, U. S. S. C., 19 S. C. Rep. 416.

32. DESCENT AND DISTRIBUTION — Advancements.—A writing acknowledged the receipt of $500 by a son from his father, to be in full of all claims as heir against the latter's estate. The sum was to bear 6 per cent. interest from date. Held, that this was not an advancement as to the interest, and the father's estate could recover it.—SLAUGHTER v. SLAUGHTER, Ind., 52 N. E. Rep. 994.

33. EASEMENT—Lease—Grant—License.—A letter conferring the "privilege" of building a logging railroad across the writer's land is not a lease, where it does not give exclusive possession of any part of the land, and no rent is reserved, and no consideration is paid or promised for the right.—NOWLIN LUMBER CO. v. WILSON, Mich., 78 N. W. Rep. 338.

34. EASEMENTS—Obstructions of Light and Air.—The right of one to shut off air and light, from his neighbor's windows by building on his own lots is unaffected by his motive.—BORDEAUX v. GREENE, Mont., 56 Pac. Rep. 218.

35. EJECTMENT—Estoppel.—Where officers of a company, knowing that B claimed land which originally belonged to it under a tax deed, and had offered it for sale, and that defendants were logging all the lands they could purchase in that vicinity, at defendant's request fixed a price on its lands including the track claimed by B, but stated that it did not own the latter tract, it is estopped from asserting title, as against defendants, who purchased from B, since it had reasonable ground to apprehend that defendants would purchase of B after its disclosure.—TWO RIVERS MFG. CO. v. DAY, Wis., 78 N. W. Rep. 440.

36. EJECTMENT — Improvements—Color of Title.—A holding under an invalid certificate of homestead entry is not under "color of title," so as to entitle defendant in ejectment to recover, under Rev. St. 1878, § 3096, for improvements.—WHITCOMB v. PROVOST, Wis., 78 N. W. Rep. 432.

37. EVIDENCE—Declarations of Vendor — Fraudulent Conveyance.—The general rule undoubtedly is that the declarations of a vendor of property, made after the sale, are not admissible for the purpose of invalidating it; yet, where the transfer is claimed to have been fraudulent, and the intent of the vendor is a material subject of inquiry, great latitude is allowed in showing the facts and circumstances surrounding the transaction. In such case it is proper to show the acts and declarations of the vendor at the time of and immediately after the sale, for the purpose of establishing the intent with which it was made on his part.—HOOD v. GIBSON, Kan., 56 Pac. Rep. 148.

38. EVIDENCE—Mental Unsoundness.—When the condition of mind of a person is shown to have been the same for a considerable period of time, an adjudication as to such condition at one date during the period is competent evidence when the act claimed to have been affected by such condition occurred at a prior date, upon the theory that it is reasonable to say that appearances determined at one time during the period to indicate insanity or incompetency, indicate the same at other times during such period, whether before or subsequent to the adjudication.—SMALL v. CHAMPENY, Wis., 78 N. W. Rep. 407.

39. EVIDENCE — Opinions.—One who has been employed in a fur store for six years, in part as a salesman, and knows the cost and selling price of all garments that have come into the store during that period, may give an opinion of the value of certain of the goods.—KNIGHT v. ROTHSCHILD, Mass., 52 N. E. Rep. 1062.

40. EXECUTION — Exemptions—Insurance.—Proceeds of an insurance policy on exempt property are exempt.—WRIGHT v. BROOKS, Tenn., 49 S. W. Rep. 828.

41. EXECUTION SALE—Inadequacy of Price.—Mere inadequacy of price, bid at an execution sale, is no ground for allowing the execution defendant to enforce his title after lapse of time for redemption, at least against a *bona fide* purchaser for value from the purchaser at the sale.—PHILLIPS v. HYLAND, Wis., 78 N. W. Rep. 431.

42. FORCIBLE DETAINER—Demand.—Under Code Civ. Proc. § 2081, subd. 1, making one guilty of forcible detainer who, by force or threats, unlawfully holds possession of any realty, whether the same was acquired peaceably or otherwise, a demand for possession is not essential to a recovery, though it was acquired peaceably.—MCCLEARY v. CROWLEY, Mont., 56 Pac. Rep. 227.

43. FRAUD—Circumstantial Evidence.—Plaintiff sued for money, which he claimed to have advanced to defendant after receiving it from defendant's husband,

who was dead when the suit was brought, in satisfaction of a debt contracted 17 years previously. Held, that evidence of plaintiff's straitened financial condition while defendant's husband had ample means was admissible to show that plaintiff's claim was fraudulent.—WILLIAMS v. WILLIAMS, Wis., 78 N. W. Rep. 419.

44. FRAUD—Election of Remedies.—One who has been induced to enter into a contract by fraudulent representations, and has sustained damages in its performance, may waive the tort, and recover on the ground of implied contract.—HUGANIR v. COTTER, Wis., 78 N. W. Rep. 423.

45. FRAUD—What Constitutes—Evidence.—Where the lessor of land issues to the lessee, who agrees to erect a building thereon, a receipt for the first year's rent, which, however, was not paid, he does not thereby give the lessee a fictitious credit; and it cannot be said that a builder relied thereon in making a contract with the lessee to erect the building, so as to enable the builder to recover of the lessor, as for fraud, damages resulting from the fact that the building is not erected, and the lessee proves irresponsible.—MCCLURE v. CAMPBELL, Mo., 49 S. W. Rep. 881.

46. FRAUDULENT CONVEYANCES — Consideration. — A corporation applied to a bank for a loan, which was granted, on condition that it indorsed notes of one of its officers then held by the bank. Thereafter the corporation executed a chattel mortgage to the bank to secure the loan so made, and also its liability on the indorsement. Held, that the mortgage was not fraudulent as against other creditors, since the indorsement was for a valuable consideration.—SARGENT v. CHAPMAN, Colo., 56 Pac. Rep. 194.

47. FRAUDULENT CONVEYANCES—Evidence.—Where a creditor takes a mortgage from the debtor to secure a *bona fide* debt, or accepts property at a valuation equal to 75 per cent. of the inventory price in consideration of the debt, an inference of fraud is not justified.—CUNNINGHAM v. EAGAN, Wis., 78 N. W. Rep. 402.

48. GARNISHMENT—Property Subject.—Where plaintiff in garnishment showed money in garnishee's hands, placed there by defendant in garnishment, the garnishee could show that the money, though deposited with him by defendant, was deposited as stake money for a bet and as the money of a third person.—STADLER v. SMITH, Wis., 78 N. W. Rep. 420.

49. HOMESTEAD.—Under an admission that property in controversy is a homestead, and has been set apart as provided by law, it cannot be objected that the homestead did not allege its statutory value in the declaration of homestead.—MITCHELL v. MCCORMICK, Mont., 56 Pac. Rep. 217.

50. INFANTS—Civil Liability.—An infant who hires a team and buggy for a specified journey, and drives to another place, and in a different direction, takes upon himself all the consequences following therefrom. If the team is injured or the buggy is broken while being so driven, he is liable in damages for the tort, and his infancy is no protection to him.—CHURCHILL v. WHITE, Neb., 78 N. W. Rep. 369.

51. INJUNCTION — Execution.—Where an execution sale might becloud the title to land, equity may enjoin it, though the sale would pass no title to the purchaser.—ZIMMERMAN v. MAKEPEACE, Ind., 52 N. E. Rep. 991.

52. INNKEEPERS — Guests — Negligence.—A notice, posted in the rooms of an hotel, directing guests to leave their "valuables" in the hotel vaults, does not apply to mineral specimens in a guest's trunk.—BROWN HOTEL CO. v. BURCKHARDT, Colo., 56 Pac. Rep. 188.

53. INSURANCE — Arbitration — Waiver.—An insurer, failing to appoint an appraiser to assist in adjusting a loss by arbitration, according to a provision of the policy, after insured had twice requested him to do so, and then agreeing to a submission not in accordance with the policy, thereby waives a condition of the policy requiring a determination of the amount of the loss by arbitration.—SCHOUWEILER v. MERCHANTS' MUT. INS. ASSN., S. Dak., 78 N. W. Rep. 356.

54. INSURANCE—Indivisible Contract.—A policy of insurance on a building and contents, the premium being distributed part to each species of property, is a single, indivisible contract, and under a general forfeiture clause in the policy, if one part of the risk is affected, the entire risk is affected. What bars a remedy on the policy as to one part of the property, bars the remedy as to all.—WORACHEK v. NEW DENMARK MUT. HOME FIRE INS. CO., Wis., 78 N. W. Rep. 411.

55. INTOXICATING LIQUORS.—Where a liquor license was issued, an appeal then taken, and the license suspended, the appeal finally determined in favor of the applicant, and the license reissued, held, following the principle of former cases, that the licensee was entitled to repayment of such proportion of the license fee as the time when his enjoyment of the license was suspended bore to the license year.—CITY OF AUBURN v. MAYER, Neb., 78 N. W. Rep. 462.

56. IRRIGATING DITCH—Wrongful Diversion—Injunction.—Land owners appropriating water from a ditch for irrigation may have the ditch owner restrained from diverting the water, where it is shown that they were compelled, solely by reason of the scarcity of the water when the ditch was not entitled to its full supply, to prorate with other consumers water which they needed to make their lands productive, and to all of which they were entitled under appropriations prior to those of such other consumers.—BROWN v. FARMERS' HIGH LINE CANAL & RESERVOIR CO., Colo., 56 Pac. Rep. 183.

57. IRRIGATION—Appropriation of Waters.—A priority to waters for irrigation confers no right to appropriate them for storage in any greater quantity or at any other time than they could be appropriated for irrigation, as against another appropriator, whose right is subsequent to the appropriation for irrigation, but prior to that for storage.—COLORADO MILLING & ELEVATOR CO. v. LARIMER & WELD IRR. CO., Colo., 56 Pac. Rep. 185.

58. JUDGMENT—Fraud — Impeachment.—A judgment of the county court in a settlement by an executor may be impeached for fraud in a suit in equity.—ANDERSON v. ANDERSON, Ill., 52 N. E. Rep. 1038.

59. JUDGMENT—Res Judicata.—Where, in a previous suit, the validity of a tax deed was determined, but one of the issues on which its invalidity was predicated was not passed on, such remaining issue cannot be urged in a subsequent suit attacking the validity of the deed, since *res judicata* applies not only to points on which the court announces its judgment, but to every point involved in the litigation.—DONNELL v. WRIGHT, Mo., 49 S. W. Rep. 874.

60. JUDGMENT—Revival—Presumption of Payment.—The lapse of 14 years after the entry of a judgment, and before a proceeding to revive is instituted, without issuance of an execution, raises the presumption of payment. This presumption, however, is not conclusive, but may be overcome by proof that the judgment has never been paid.—WITTSTRUCK v. TEMPLE, Neb., 78 N. W. Rep. 456.

61. JUDICIAL SALES—Appraisement.—The provision of the statute for the deduction of prior liens in appraising lands for judicial sale is solely for the benefit of the plaintiff, and the failure to observe the law in that regard cannot be successfully urged by the defendant as a ground for vacating the appraisement, or as an objection to confirmation.—BALLOU v. SHERWOOD, Neb., 78 N. W. Rep. 383.

62. LANDLORD AND TENANT—Cancellation of Lease.—Where a landlord refuses to cancel a lease, and notifies the tenant he will hold him for the rent, he is not compelled to take possession on the tenant's quitting the premises, and try to rent them.—PATTERSON v. EMERICK, Ind., 52 N. E. Rep. 1012.

63. LANDLORD AND TENANT—Contracts of Sale.—The relation between a vendor and a vendee in possession becomes that of landlord and tenant, on the vendee's refusal to pay installments of the price because of the

vendor's inability to convey according to his bond.—SIEVERS v. BROWN, Oreg., 56 Pac. Rep. 171.

64. LANDLORD AND TENANT—Defective Premises.—A landlord who let an entire tenement is not liable for injuries to a subtenant of one of the tenements, through defects in a stairway used as a common entrance for several of the tenements, since he was no longer in possession of it, and was not obliged to make repairs.—MARLEY v. WHEELWRIGHT, Mass., 52 N. E. Rep. 1066.

65. LANDLORD AND TENANT—Lease—Destruction of Subject-matter.—When the subject-matter of an alleged lease is destroyed, the estate of both lessor and lessee ends, and the relation of landlord and tenant can no longer survive, and an instruction which, in effect, informed the jury that the leasehold estate of plaintiff continued after destruction of the subject-matter of the lease, was erroneous.—UTAH OPTICAL CO. v. KEITH, Utah, 56 Pac. Rep. 155.

66. LANDLORD AND TENANT—Liability to Strangers.—A landlord is not liable to a stranger for injury received in falling into the coal hole in front of and connected with the leased premises, due merely to failure of the tenant to fasten the cover, which was in good condition.—FRISCHBERG v. HURTER, Mass., 52 N. E. Rep. 1086.

67. LIMITATIONS—Mortgages — Foreclosure.—Where five years have elapsed after maturity of a note, no suit to foreclose a mortgage securing it can be maintained.—WHIPPLE v. JOHNSON, Ark., 49 S. W. Rep. 827.

68. MANDAMUS TO COUNTY—Payment of Judgment.—The return of a county to an alternative writ to compel the county court to draw its warrant on the treasurer to pay relator's judgment is sufficient on demurrer, which shows there is no money of the county unappropriated to the payment of demands against it and liable to relator's judgment, and that the various funds for the years subsequent to the accrual of relator's demand are covered and liable for warrants legally drawn on them, though it does not state what portions of the various funds belong to each year, relator not having asked to have the return made more specific in this respect.—STATE v. DOUGLAS COUNTY, Mo., 49 S. W. Rep. 862.

69. MARRIED WOMEN—Judgments.—Where a woman is covert when she commences an action for partition of the estate of her ancestor, and remains so until her death *pendente lite* a judgment afterwards rendered against her personally for costs is absolutely void.—HINKLE v. KERR, Mo., 49 S. W. Rep. 864.

70. MASTER AND SERVANT—Assumption of Risk.—Where a quarryman understanding quarrymen's work, and whatever danger there was, at request of the superintendent for some one to help clean out the tamping remaining in two holes in a ledge after an attempt to fire them and an explosion, held the drill while it was being struck by the superintendent and another, and continued so to do without any assurance that it was safe, after the superintendent, in reply to a suggestion of some one that water should be put in the hole before it was drilled out, said that he did not want to put any water in it, that he wanted to fire it out as soon as it was cleaned out, recovery cannot be had for injury to the quarryman from an explosion caused by such work.—ALLARD v. HILDRETH, Mass., 52 N. E. Rep. 1061.

71. MASTER AND SERVANT—Contributory Negligence.—Though an employee engaged in teaming on his employer's private road may have assumed the risk of a defect therein by passing over it many times, yet, if the employer promises to repair it before he must pass over it again, he may rely on such promise, and is not precluded from recovering for injuries due to a failure to perform the promise on the ground of assumed risk.—NELSON v. SHAW, Wis., 78 N. W. Rep. 417.

72. MASTER AND SERVANT — Dangerous Machinery—Warning.—One employed to take charge of machinery cannot recover for injuries caused by his being caught, while attempting to throw off a belt, in a projecting set screw that fastened a collar near the end of the revolving shaft, which was put in without his knowledge, and without any warning of the danger of its use, where he was not acting in reliance on his former observation of the machinery.—FORD v. MT. TOM SULPHATE PULP CO., Mass., 52 N. E. Rep. 1065.

73. MASTER AND SERVANT—Right to Abandon Employment.—Where a servant employed under a contract for a definite time, which stipulated the damages for its breach, was, without his or the master's fault, prevented from fulfilling it, he may recover the wages actually earned, less the liquidated damages stipulated for a breach of the contract.—FISHER v. WALSH, Wis., 78 N. W. Rep. 437.

74. MECHANICS' LIENS — Incompleted Contract.—When work is done and materials furnished to erect a building for the owner of a whole tract of land, which has no visible divisions, it warrants a finding that the whole tract is one lot, and that there is a lien on the whole for the sum due, under Pub. St. ch. 191, § 1, providing for a lien on the "lot of land" on which the building is situate, and for which labor and material are furnished.—ORR v. FULLER, Mass., 52 N. E. Rep. 1091.

75. MECHANIC'S LIEN—Priorities.—One contracted to furnish all the lumber of certain kinds for a house and barn, and, after part thereof was furnished, the owner mortgaged the land, and thereafter the balance of the lumber was furnished. Pub. St. ch. 191, § 5, provides that the lien provided for in the chapter shall not avail against a mortgage made and recorded before the contract under which the lien is claimed. Held, that a lien could be enforced for materials furnished after the mortgage was recorded.—SPRAGUE v. MCDOUGALL, Mass., 52 N. E. Rep. 1077.

76. MINES AND MINERALS — Claims within Placer Claims.—A placer location confers neither title to nor possession of, nor withdraws from subsequent location by others, known lodes or veins of mineral in place within its limits, under Rev. St. U. S. § 2333, providing that a placer patent which fails to include an application for a vein or lode claim known to exist within its limits shall be deemed a conclusive declaration that the placer claimant has no right thereto.—MT. ROSA MINING, MILLING & LAND CO. v. PALMER, Colo., 56 Pac. Rep. 176.

77. MORTGAGE — Condemnation—Damages.—A mortgagee of premises part of which are condemned, so as to require reconstruction of the stable thereon and an expenditure of more than the amount of damages awarded to restore the property to as valuable condition as before, cannot complain that the court directs payment of the damages to the mortgagor, where he is required to restore the premises to their former value.—STOPP v. WILT, Ill., 52 N. E. Rep. 1028.

78. MUNICIPAL CORPORATIONS — Trusts.—If property consisting of real estate be by will conveyed to trustees to hold for the life of certain persons in being therein named, the income therefrom to be used so far as necessary to keep the property in repair and pay the taxes and insurance, and the balance to be paid to those having the life interest during the continuation of their lives, and the *corpus* of the property to be, at the termination of the life interest, conveyed to a municipal corporation for purposes for which it may legally hold and devote it, and there be ample income from such property to preserve it for the ultimate purpose named in the will, and there be no express power in the will for the trustees to make permanent repairs or improvements on the property out of the *corpus* thereof, only the income can be devoted to that purpose.—IN RE COLE'S ESTATE, Wis., 78 N. W. Rep. 402.

79. MUNICIPAL CORPORATIONS — Contract for Constructing Street.—In an action against a city to recover a part of the contract price for constructing a street, retained by the city to secure a covenant by plaintiffs to keep the street in repair for five years, defendant may rely for defense upon defects in the original construction, which it could not have discovered by the

exercise of ordinary care prior to the acceptance of the work.—CITY OF LOUISVILLE v. MULDOON, Ky., 49 S. W. Rep. 791.

80. MUNICIPAL CORPORATIONS—Validity of Ordinance.—A city ordinance providing for the removal of carcasses of dead animals, and fixing charges therefor, is void unless it gives the owner of a dead animal the right to remove it, or have it removed, within a prescribed time before the public contractor takes charge thereof.—MEYER v. JONES, Ky., 49 S. W. Rep. 809.

81. NEGLIGENCE OF POSTMASTER.—While a postmaster is liable to private parties for moneys or property coming to his hands as such postmaster, and lost through the wrongful act, neglect, or default of such postmaster, his assistants or servants, an action to recover the same should be brought against the postmaster, and not upon his official bond.—IDAHO GOLD REDUCTION CO. v. CROGHAN, Idaho, 56 Pac. Rep. 164.

82. OFFICERS — Power of Legislature to Change Compensation.—Const. § 161, providing that the compensation of any city officer "shall not be changed after his election or appointment or during his term of office," applies only to officers having a fixed term, and does not forbid the reduction of the salary of a policeman removable by the board of police commissioners at pleasure.—CITY OF LEXINGTON v. RENNICK, Ky., 49 S. W. Rep. 787.

83. PARTNERSHIP — Exemptions Out of Partnership Property.—A partner may claim exemptions out of partnership property, as against his individual creditors.—SOUTHERN JELLICO COAL CO. v. SMITH, Ky., 49 S. W. Rep. 807.

84. PARTY WALLS—Relation of Owners.—Owners of a party wall, built at joint expense, are not tenants in common, but each owns in severalty the part thereof situated on his own land, with an easement of support from the other part.—SHIVERICK v. R. J. GUNNING CO., Neb., 78 N. W. Rep. 460.

85. PLEADING — Building and Loan Associations.—A suit by a building and loan association to foreclose a mortgage, and to enforce a lien on shares of stock of the mortgagor given as collateral security to the mortgage, is not an action on the certificate, within Burns' Rev. St. 1894, § 365 (Horner's Rev. St. 1897, § 362), requiring the filing of a copy of a written instrument with any pleading founded thereon, and hence such certificate, when filed with the complaint, will not be considered in determining the sufficiency of the complaint.—INDIANA MUT. BLDG. & LOAN ASSN. v. PLANK, Ind., 52 N. E. Rep. 991.

86. PROHIBITION—Courts—Jurisdiction.—On an application for a writ of prohibition to arrest the proceedings of a district court in a pending suit in equity, it will be presumed, in the absence of a showing to the contrary that the court will not exceed the limitations of its jurisdiction, though it has no jurisdiction to grant a part of the relief asked for.—STATE v. DISTRICT COURT OF SILVERBOW COUNTY, Mont., 56 Pac. Rep. 219.

87. RAILROAD COMPANY—Contributory Negligence.—An adult woman was proceeding along a pathway between railway tracks to a station, with an umbrella over her head, which obstructed her view, and, knowing that a train was approaching behind her, suddenly, without looking, rushed to a point where a collision was inevitable. She was not in danger so long as she followed the path. The company had no reason to anticipate that she intended to cross the track, or venture too near the cars, until they were so close that a collision could not be avoided. Held that, in action by the husband for damages for her death, an instruction in the nature of a demurrer to the evidence was proper.—KREIS v. MISSOURI PAC. RY. CO., Mo., 49 S. W. Rep. 877.

88. RAILROAD COMPANY — Damages for Injury to County Road.—Evidence that a railroad, crossing and running parallel with a county road, endangers travel thereon, is not admissible in an action by the county to recover damages for the construction of the railroad; but the testimony should be confined to the reasonable cost of putting the county road in as good condition as it was before the railroad was built.—RICHMOND, N., I. & B. R. CO. v. ESTILL COUNTY, Ky., 49 S. W. Rep. 805.

89. RAILROAD COMPANY—Location—Certainty.—Where the location of a railroad states that "the width of line taken varies from two to five rods, according as the embankments or excavations require," the uncertainty of the taking, outside of the two-rod strip, does not invalidate the location to extent of the two rods, as against a landowner who acquiesced in the location for nearly 50 years.—HARDING v. BIGGS, Mass., 52 N. E. Rep. 1060.

90. RAILROAD COMPANY—Negligence.—One who stands on a railroad track for two or three minutes in front of an approaching train which can be seen for three-quarters of a mile, without taking any precautions, and is struck by it, is guilty of contributory negligence as a matter of law. Even though the railroad company be culpably negligent in running its trains at an unlawful rate of speed, such contributory negligence bars a recovery.—DULL v. CLEVELAND, C., C. & ST. L. RY. CO., Ind., 52 N. E. Rep. 1013.

91. RAILROAD COMPANY—Right of Way.—The construction of a fenced lane across the right of way of a railroad company, and beneath a bridge carrying the tracks, so as to provide a subway for the passage of live stock, is not so foreign to the purposes of a grant of land for railroad purposes that the grantor can complain thereof as an abandonment of the right of way granted, or as a trespass upon his reversionary rights.—REICHERT v. KELLER, Neb., 78 N. W. Rep. 881.

92. RAILROAD COMPANY — Street Railroads — Negligence.—A horse drawing a buggy in which plaintiff was seated was driven in a public street near defendant's electric car, which made a loud noise and threw sparks from its wheels. When the motorman rang the gong, the horse took fright, and plaintiff was injured. It did not appear that the noise and sparks were due to any defect in construction, or negligence in operating the car, and the horse did not appear to be frightened until the gong sounded. Held no evidence of defendant's negligence.—HENDERSON v. GREENFIELD & T. F. ST. RY. CO., Mass., 52 N. E. Rep. 1080.

93. RECEIVERS—Actions—Presumptions.—It will be presumed, in the absence of evidence to the contrary, that a note sued on by a receiver who was appointed, in a controversy over a note, to collect the same and hold the proceeds pending decision, was the one in controversy in the action in which the receiver was appointed, and that he is lawfully in possession.—DRIVER v. LANIER, Ark., 49 S. W. Rep. 816.

94. SALE—Construction of Contract.—Where defendant contracted to purchase certain timber from plaintiff, and the timber furnished was cut for plaintiff on lands belonging to the government, but without knowledge thereof of either plaintiff or defendant, defendant is entitled to a reduction of the price to the amount paid by him to the government in settlement of the trespass.—PARISH v. MCPHEE, Wis., 78 N. W. Rep. 421.

95. SALES—Rescission.—After defendant had agreed to give a note to plaintiff for lumber, he learned that it was incumbered with a lien; and, when plaintiff demanded the note, he refused to give it, unless plaintiff should clear the title or give bond for a delivery free from liens. Plaintiff gave no bond, and shortly afterwards planed defendant's name from the lumber, and sold it to another. Held, that the contract of sale was rescinded.—SHORES LUMBER CO. v. CLANEY, Wis., 78 N. W. Rep. 451.

96. SALES—Warranty.—Where a sale with warranty is within the statute of frauds when made, but the goods are afterwards delivered, the fact that at the time of delivery a bill is sent, bearing a printed notice that the vendor sells no goods with warranty, does not prevent the parol warranty from attaching by delivery of the goods, except in so far as the printed notice

tends to show a rescission of the parol contract.—EDGAR V. JOSEPH BRECK & SONS CORP., Mass., 52 N. E. Rep. 1083.

97. SALES—Warranty—Rescission.—If a contract of sale of personalty is executory, and accompanied by a warranty of the quality of the property, or that it is to be fit or suitable for a specified purpose, and, if it is not, may be returned, and the consideration not paid, there may be a rescission for a breach of the warranty.—MCCORMICK HARVESTING MACH. CO. V. KNOLL, Neb., 78 N. W. Rep. 394.

98. SALE OF LAND—Action for Price.—In a suit to recover the purchase price of real estate, alleged to have been sold and conveyed by the plaintiff to the defendant, it is not essential that the petition should allege that the contract of sale was in writing.—SOWARDS V. MOSS, Neb., 78 N. W. Rep. 373.

99. SET-OFF—Joint Demands.—Under Pub. St. ch. 168, § 8, providing that, where there are several defendants, a demand to be set off shall be due to them jointly, a judgment against a party in favor of others cannot be set off in an action against the latter and another.—SIMMONS V. SHAW, Mass., 52 N. E. Rep. 1087.

100. SPECIFIC PERFORMANCE—Contract.—A parol contract between father and son that the son shall go on land of the father, improve it, and pay the taxes, and have it, is not sufficiently definite and unequivocal for specific performance; no time being fixed for giving a deed, and nothing being said as to the nature or character of the improvements.—WOODWARD V. WOODWARD, Ill., 52 N. E. Rep. 1041.

101. TAXATION—Corporations.—A State tax on a corporation's capital employed in manufacturing, when it also sells goods manufactured outside the State, is not within the constitutional inhibition against a State taxing imports or regulating interstate commerce.—PEOPLE V. ROBERTS, N. Y., 52 N. E. Rep. 1104.

102. TAXATION — Corporations.—Where part of the business of a manufacturing corporation is selling imported goods from broken packages, it is not exempt from taxation as a manufacturing corporation, under Laws 1880, ch. 542, § 3, as amended, exempting corporations wholly engaged in manufacturing within the State.—PEOPLE V. ROBERTS, N. Y., 52 N. E. Rep. 1102.

103. TENANCY IN COMMON—Lease from Co-tenant.—Where tenants in common lease the property for one year to a firm of which one of them is a member, and the lessee holds over after the expiration of the year without exercising a privilege of renewal given by the lease, under an arrangement between the firm and the co tenant in possession, it does not continue the tenancy for another year, as it will not be presumed that such co-tenant continues to hold under the lease; and it is error to exclude evidence of the lessees showing that he had assumed his relation to the premises as owner, and given his consent to the company to hold over.—VALENTINE V. HEALEY, N. Y., 52 N. E. Rep. 1097.

104. TRIAL—Examination.—Where, in an action for personal injuries, defendant proved that plaintiff refused to submit to an examination by defendant's physicians, it was competent for plaintiff to explain, as a reason for such refusal, that he consulted with his physician, and determined, on his advice, that it would be apt to result injuriously, and retard his recovery.—F. W. COOK BREWING CO. V. BALL, Ind., 52 N. E. Rep. 1002.

105. TRIAL—Instructions.—Under Rev. St. 1889, § 2188, requiring the court to give instructions when the evidence is concluded, and before the case is argued or submitted to the jury, the giving of an instruction, after argument, to cure misconduct therein, is not an irregularity authorizing granting a new trial.—YORE V. MUELLER COAL, HEAVY HAULING & TRANSFER CO., Mo., 49 S. W. Rep. 855.

106. TRUSTS—Constructive Trust.—When an agent who foreclosed a mortgage for his principal was authorized to do so, and his only fraud consisted in bidding in the property in his own name, the principal need not treat the mortgage as unforeclosed, but may bring suit against the agent to enforce the constructive trust.—LUSCOMBE V. GRIGSBY, S. Dak., 78 N. W. Rep. 357.

107. TRUSTS—Equity — Liens.—A trustee was to support and educate the beneficiary during minority, and then convey one-half of the estate to her, retaining the other half; but he failed to observe the trust, and his heirs claimed the entire estate, thus forcing the minor to expend over half the rents during her minority to enforce the trust, and the balance fell short of an adequate support for her. Held, in partition to divide the estate and adjust the equities at her majority, that equity would impress a lien on the share of the trustee's heirs for the amount necessary to make up the reasonable cost of her support.—MILLER V. MILLER, Mo., 49 S. W. Rep. 852.

108. VENDOR AND PURCHASER—Rescission.—A vendee under an executory contract cannot rescind and recover back payments because of defects in the title while retaining possession of the land.—SIEVERS V. BROWN, Oreg., 56 Pac. Rep. 170.

109. VENDOR AND PURCHASER — Setting Aside Sale—Fraud.—A presumption of fraud arises where the value of land sold is grossly in excess of the price, which fraud, if not rebutted by the vendor, may be relied on by the vendee, on seeking, in a court of equity, to set aside a parol sale of the land, and to compel the vendor to account for improvements placed thereon by the vendee while in possession.—MANN V. RUSSEY, Tenn., 49 S. W. Rep. 835.

110. WAREHOUSEMEN—Conversion by Agent.—A sale, by one in charge of a warehouse, of goods stored therein, under a belief that they had been abandoned, amounts to a conversion.—CRESON V. WARD, Ark., 49 S. W. Rep. 827.

111. WATERS—Diversion.—Where, in a suit to enjoin the diversion of the water of a stream as interfering with plaintiffs' right to a specific quantity thereof for irrigation both plaintiff and defendants have acquired rights to the use of the waters by the appropriation thereof by means of dams and ditches, and defendants claim by right superior to the rights of other landowners who maintain dams between those of plaintiff and defendants, such intermediate owners are necessary parties to the suit.—BLISS V. GRAYSON, Nev., 56 Pac. Rep. 231.

112. WATERS AND WATER COURSES — Obstructing Natural Flow.—A person having no right to maintain a ditch across a railroad right of way cannot recover for the company's obstructing the ditch on its own land, the ditch carrying off surface water only.—CLEVELAND, ETC. RY. CO. V. HUDDLESTON, Ind., 52 N. E. Rep. 1008.

113. WILLS—Construction.—The provisions of a will relating to personal property situate in this State must be construed according to the law of the domicile of the testator at the time of his death.—CRANDELL V. BARKER, N. Dak., 78 N. W. Rep. 347.

114. WILL—Construction — Jurisdiction.—A court of equity being authorized to construe wills, and having entertained a bill for that purpose, the fact that it was mistaken in the conclusion that it required construction and the appointment of a trustee does not make its decree void for want of jurisdiction.—STOFF V. MCGINN, Ill., 52 N. E. Rep. 1048.

115. WILL—Power of Sale — Administrator.—Though a power of sale given by a will to the executor cannot be executed by the administrator *de bonis non*, yet, sale being necessary for distribution according to the will, he may as trustee be authorized by the court to make the sale.—MULLIGAN V. LAMBE, Ill., 52 N. E. Rep. 1052.

116. WITNESSES — Right to Contradict.—By merely swearing a witness, and asking him a question having no bearing on the issue, a party does not make him his own, so that he cannot thereafter contradict him when testifying for the adverse party.—FALL BROOK COAL CO. V. HEWSON, N. Y., 52 N. E. Rep. 1095.